93-633

CASE NO. _____

Supreme Court, U.S.
FILED
OCT 22 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE AGENCY FOR HEALTH CARE ADMINISTRATION, as the successor in interest to, SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Petitioner,

versus

LEXEN PITTMAN, by his next friend, Ramona Pope,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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24 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THERE IS A PRIVATE RIGHT ENFORCEABLE BY 42 U.S.C. 1983 TO COMPEL A STATE MEDICAID PROGRAM TO FUND A LIVER-BOWEL ORGAN TRANSPLANT OPERATION, IT HAS CHOSEN NOT TO COVER.

II

WHETHER THE STATES HAVE THE OPTION UNDER THE MEDICAID STATUTE, 42 U.S.C. 1396b (i)(1) NOT TO COVER ORGAN TRANSPLANT OPERATIONS.

III

IF SO, WHETHER THE PASSAGE OF EPSDT AMENDMENTS OF 1989, 42 U.S.C. 1396d(r)(5), IMPLIEDLY REPEALED, 42 U.S.C. 1396b(i)1.

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KEY TO RECORD ON APPEAL REFERENCES

The following designation is used in making references to the Record on Appeal: the page number of the Appendix appears as (A page number).

OPINION BELOW

The order of the United States Court of Appeals, Eleventh Circuit, was issued on July 29, 1993 and the opinion on August 3, 1993. The order and opinion are reproduced in the Petitioner's Appendix at (A 162-179).

GROUND UPON WHICH JURISDICTION IS INVOKED

The order and opinion of the United States Court of Appeals, Eleventh Circuit, were rendered on July 29, 1993 and August 3, 1993, vacating the District Court's denial of a preliminary injunction and granting a motion to dismiss, remanding with instructions to enter a preliminary injunction compelling Florida's Medicaid program to fund a liver-bowel organ transplant.

The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Respondent, LEXEN PITTMAN by and through his mother, sued the State of Florida's Medicaid program in the Southern District of Florida on June 1, 1993. The action sought to compel the Medicaid program to pay for a liver-bowel organ transplant. Declaratory and injunctive relief were sought pursuant to 42 U.S.C. 1983. (A 1-9).

The AGENCY defended on two grounds. First, that 42 U.S.C. 1396b(i)(1) gave the State Medicaid programs the option to decide which, if any, organ transplant operations would be covered services under the Medicaid plan. Secondly, that 42 U.S.C. 1396b(i)(1) did not create a private right of action to compel a state to fund a liver-bowel transplant operation pursuant to 42 U.S.C. 1983. The 1983 issue was raised by memoranda and a motion to dismiss filed before the District Court entered its order on July 19, 1993. (A 10-51, 101-104, 105-114, 121-131). The District Court denied the preliminary injunction and found that PITTMAN had no legally protected right to the operation and the states had the option not to cover organ transplants. (A 132-147).

PITTMAN filed a motion for injunction pending appeal. (A 148-158). The Eleventh Circuit Court of Appeals responded on an emergency basis. By order of July 29, 1993, it found PITTMAN's life was in imminent danger, vacated the District order denying the preliminary injunction, and remanded with instructions to enter a preliminary injunction. It deferred a more detailed opinion. (A 178-179). On August 2, 1993 the District Court entered an order requiring the AGENCY to pay for the operation. (A 180-181).

On August 3, 1993, the Eleventh Circuit issued its memorandum and order. It held that Congress had impliedly repealed 42 U.S.C. Sec. 1396b(i)(1) (the option to exclude organ transplants) by the passage of the early and periodic screening, diagnostic, and treatment services (EPSDT) amendments of 1989, 42 U.S.C. 1396d(r)(5). The Eleventh Circuit also found that 1396b(i)(1) was a condition for the funding of organ transplants and not an affirmative grant of discretion. (A 162-179).

The AGENCY moved for a stay . This was denied by the Eleventh Circuit on August 12, 1993 which found the 1983 issue had been waived. (A 182-183). However, the 1983 issue had been raised by motion to dismiss in the

District Court which granted the motion. (A 115-117, 132-147, 184-194). The Eleventh Circuit in the August 12, 1993 order stated that the issue was not presented in the AGENCY's initial brief on appeal and cited to "appellee's brief pp. 4-5." (A 182-183). The AGENCY did not file an appeal. It did not file a brief. The AGENCY filed a response in opposition to Plaintiff's motion for an injunction pending appeal on July 23, 1993. (A 159-161). In that response, the AGENCY relied on prior memoranda, which raised the 1983 issue and attached copies. Further, the AGENCY stated that the Plaintiff-Appellant (PITTMAN) had raised no new arguments that he had a federally enforceable right to compel the Defendant-Appellee to fund the liver-bowel transplant. (A 159-161).

THE STATUTES INVOLVED

The Medicaid Act is part of the Social Security Act as Title XIX. It is codified as 42 U.S.C. 1396 et seq.

42 U.S.C. 1396 provides in relevant part,

> "For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and

of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services . . ."

42 U.S.C. 1396b(i)(1) provides,

"Payment under the preceding provision of this section shall not be made —

(1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that —

(A) similarly situated individuals are treated alike; and

(B) any restrictions, on the facilities or practitioners which may provide such procedures is consistent with the accessibility of high quality care to individuals eligible for the procedures under the state plan . . ."

42 U.S.C. 1396(d)(r)(5) provides in relevant part,

"The term "early and periodic screening, diagnostic, and treatment services" means the following items and services:

* * *

(5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan."

REASON FOR GRANTING THE WRIT

A. ISSUES

This case presents the important issues of whether the states have the option to exclude from Medicaid covered services organ transplant operations; and, if so, whether Congress impliedly repealed such option by the passage of the 1989 EPSDT amendments. Most fundamentally, the issue presented is whether the Circuit Courts are going to ignore the development of the law as reflected in Suter v. Artist M., 112 S.Ct. 1360 (1992), and Pennhurst State School and Hospital v. Holderman, 451 U.S.1, 67 L.Ed 2d 694, 101 S.Ct. 1531 (1981). This Court has previously stated that the Medicaid Act is a cooperative venture, not a vehicle to impose requirements on the states to fund what they have no say in.

> "Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund." Harris v. McRae, 448 U.S. 297, 65 L.Ed.2d 784, 100 S.Ct. 2671, 2684 (1980).

Florida, like other states, has independent expert medical advice concerning whether to include any

particular organ transplant operation as a covered service. Sec. 381.6023 Florida Statutes.

The issue is not whether it is desirable to save a child's life, or advance medical frontiers. The issue is whether the States are to be allowed any role in developing medical policy in the area of evolving efficacy in organ transplant operations.

The order of the Eleventh Circuit has eliminated any such role for the states. This is inconsistent with the very intent of Congress expressed in the beginning of the Medicaid Act to assist states to provide medical services, "as far as practicable under the conditions in such State." 42 U.S.C. 1396.

This appeal concerns the limits of the authority federal courts have to alter the relationship of the states and the federal government in the cooperative venture of the Medicaid Act through the creation of a private right of action enforceable 1983. This is totally unnecessary, besides being contrary to the decisions of this Court. Whether a state's decision to exclude liver-bowel transplants from coverage under the state Medicaid plan was made pursuant to reasonable standards would be reviewable under Beal v. Doe, 432 U.S. 438, 97 S.Ct.

2366 (1977). The Eleventh Circuit expressly did not decide that issue.

The Eleventh Circuit has re-written the terms of the undertaking between Florida and the federal government, although there was no issue presented or decided that Florida's decision to exclude such operations was irrational or unreasonable. Florida's participation in such decisions was simply eliminated by the creation of a new right and the repeal of part of the Medicaid Act.

The writ should be issued to correct the situation and to eliminate the conflict between the Circuits and federal courts. The situation now, very simply, is that Florida cannot refuse to fund any organ transplant operation for persons under 21 and, arguably for anyone, no matter what the cost, no matter how little efficacy there may be, at the expense of other Medicaid recipients. The situation envisioned by the District Court in footnote 5 of its July 19, 1993 order, wherein it stated that the plaintiff's position is that if an organ transplant operation were efficacious but cost $200 million, it would have to be covered, has occurred. The states no long have any means of containing these costs.

The speed with which the case was handled by the overburdened federal judiciary is commendable. Unfortunately, a great deal of violence was done to federal-state relationships when the decisions of this Court were ignored.

Conflict permeates the federal judicial system on the questions raised in this case. The Eleventh Circuit noted such in its August 3, 1993 order.

The Eighth Circuit Court of Appeals in Ellis by Ellis v. Patterson, 859 F.2d 52 (8th Cir. 1988) held that the states had the option not to fund organ transplants. The legislative history of 1396b(i)(1) certainly supported that decision. However, the effect of the subsequent EPSDT amendments of 1989 were of course, not before the court. Nor was any issue concerning a federally protected right under 1983 before the Court. The Ninth Circuit followed the Eighth Circuit in Dexter v. Kirschner, 972 F.2d 1113 (9th Cir. 1992) in holding that the States had the option to exclude any or all organ transplants. Again, neither the effect of the EPSDT amendments of 1989 nor 42 U.S.C. 1983's applicability were considered.

On the other hand, the Fourth Circuit in Pereira v. Kozlowski, No.: 92-2529, 1993 WL 220590 (4th Cir. 1993) held that the states never had the option not to fund organ transplant operations. The effect of the EPSDT amendments was considered, but no issue concerning 1983 was decided. The Eleventh Circuit has followed the Fourth.

There is pending in the Seventh Circuit a case identical to the present one, Miller v. Whitburn, 816 F.Supp. 505 (W.D. 1993), appeal docketed No. 93-1976 (7th Cir. 1993) and argued June 10, 1993. The District Court followed Suter v. Artist M., supra and held the plaintiff had no federally protected right to compel an organ transplant operation and that there had been no repeal of the states' option not to cover such services, 42 U.S.C. 1396b(i)(1).

Other federal district court cases are in conflict. A child's liver-bowel operation was denied in Lisa Cooley v. Robert Williams, CCH Par. 40916 (N.D.Fla. 1991). An adult heart transplant was denied in Alderman v. Williams, Case No. 92-1388-CIV-T-99C (M.D. Fla. 1992). The conflict continues in the Southern District of Florida with McLaughlin v. Williams, 801 F.Supp. 633

(S.D. Fla. 1992) which assumed without deciding, that the EPSDT amendments of 1989 had repealed by implication 42 U.S.C. 1396b(i)(1). On the other hand, the Southern District, in this case, found no such repeal.

This Court is asked to grant certiorari to resolve the conflict within the federal judiciary on the issues of whether states have the option not to include organ transplant operations as covered services and whether there is a federally protected right to compel such coverage.

Resolution of these issues will delineate the powers and responsibilities of the federal and state governments in the area of allocation of resources for health care in cooperative programs. Resolution of the issues will eliminate the conflict in the federal judiciary and maintain the development of the law as expressed in Suter v. Artist M., and Pennhurst, supra.

B. THE LEGISLATIVE HISTORY SHOWS NO CONGRESSIONAL INTENTION TO REPEAL THE STATE'S OPTION NOT TO COVER ORGAN TRANSPLANTS

From the beginning, Congress recognized the states had limited resources to provide medical services.

It did not begin the Medicaid Act with a statement that the states shall provide all necessary medical services. Cost limitations and the states' role in providing medical services were recognized in 42 U.S.C. 1396 which states that in order to assist the states, an annual appropriation shall be made so the states can provide medical assistance as far as practicable under the conditions within each state.

Thus, there was no uniform federal standard or requirement for a certain level of service mandated. Rather, the individuality of the states was recognized by the Medicaid Act.

The categories of service also reflect this Congressional intent. There are mandatory services consisting of seven categories, such as in-patient hospital services, skilled nursing facilities and physician services. 42 U.S.C. 1396d(a)(1)-(5). Other services are optional.

In 1985, and again in 1987, Congress amended the Medicaid statute to add a section governing payments for organ transplants. 42 U.S.C. 1396b(i). As the Eighth Circuit noted in Ellis supra which the statute itself can be read as merely laying out standards for payment, the legislative history reveals that Congress intended the

states to have discretion concerning organ transplant coverage.

> "The Committee wishes to emphasize that its bill does not require a State to cover any organ transplant procedures. Under the bill, States also have the discretion to cover some procedures such as liver and bone marrow transplants, but not other such as heart or heart-lung transplants. However, if a State decides to cover any procedures, it must establish formal written standards and apply them fairly and uniformly."

H.R. Rept. No. 99-265, p. 26

The conference report, H.R. Conf. Rept. No. 100-495, p. 756 reprinted in 1987 U.S. Code Cong. and Admin. News at 2313-1502 stated,

> "(e) organ transplants Technical-States which choose to cover organ transplant procedures may restrict the facilities or practitioners from whom Medicaid beneficiaries may obtain the services, so long as the restrictions are consistent with accessibility of high quality care, and so long as similarly situated individuals are treated alike."

Thus, it seemed clear to federal courts that the states had the option not to cover organ transplants. Dexter v. Kirschner, 972 F.2d. 1113 (9th Cir. 1992), Muesberger v. Palmer, 900 F.2d. 1280 (8th Cir. 1990); and Ellis v. Patterson, 859 F.2d. 52 (8th Cir. 1988).

The Medicaid Act was amended in 1989 as part of the Omnibus Budget Reconciliation Act. The present version of Section 1396d(r) requires states to provide eligible individuals under age 21 certain services, screening services, vision services, dental services, hearing services and, under subsection (5) "[s] uch other necessary health care . . . described in subsection (a) of this section to correct and ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the state plan."

It is this language which has been interpreted to repeal the option not to cover organ transplants. However, the legislative history, shows no such intention on the part of Congress.

House Conference Report 101-386, pgs. 453-454, as reprinted in U.S. Code and Administrative News, 101 st. Congress, 1989, pages 3056 and 3057 states,

> "Conference agreement
>
> The Conference agreement follows the House bill with the following modifications: (1) States are required to provide <u>any service that a State is allowed to cover with Federal matching funds</u> under Medicaid that is required to treat a condition identified during a

screen, whether or not the service is included in the State's Medicaid program . . ." (emphasis added).

C. STATUTORY ANALYSIS

Repeals by implication are not favored. TVA v. Hill, 437 U.S. 153, 57 L.Ed.2d 117, 98 S.Ct. 2279 (1978). Morgan v. Mancari, 417 U.S. 535, 41 L.Ed. 2d 290, 94 S.Ct. 2474 (1974). The intention of the legislature to repeal must be clear and manifest. Pasadas v. National City Bank, 296 U.S. 497, 80 L.Ed. 2d 351, 56 S.Ct. 349 (1936).

Nothing in the legislative history above requires the finding of an implied repeal. There is no mention of organ transplants. The reference to "any service a state is allowed to cover with Federal matching funds" has meaning because federal matching funds are not allowable under 1396b(i)(1) for organ transplants unless the state has a written plan. Thus, the reference was not to organ transplant operations.

The "other measures described in subsection (a)", as used in 1396d(r)(5), do not include a mention of organ transplants.

There is no language to the effect that notwithstanding the provisions of Section 1396b(i) the states shall supply all necessary medical services to correct any condition found during the EPSDT screens.

If the more detailed and complex statutory scheme of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. 620-628 did not create a judicially enforceable right to "reasonable efforts" of placement, then the option of the states not to cover organ transplants, 42 U.S.C. 1396b(i) cannot be said to have created rights enforceable by 1983. The reasoning of Pennhurst, supra, and Suter, supra apply with equal force to 1396b(i).

CONCLUSION

The result of the Eleventh Circuit's order is to deny the states participating in Medicaid any discretion to develop policy based on evolving medical standards, efficacy, and cost to determine whether particular types of organ transplant operations are to be covered. To achieve this result, contrary to Harris, supra, it was necessary to create a right to an organ transplant (where the Statute is silent as to recipient rights) enforceable by 42 U.S.C.

1983. This flies in the face of Suter, supra and the other decisions of this Court concerning the applicability of 1983. It was then necessary to find that Congress never intended to give the states an option to exclude such operations despite the legislative history and decisions of other Circuits. Or, in the alternative, the Eleventh Circuit found it necessary to decide that Congress had created an implied repeal.

This is not what Pennhurst, supra permits.

DATED: October 22nd, 1993.

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93-633

SUPREME COURT, U.S.
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CASE NO. _____

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OCTOBER TERM, 1993

THE AGENCY FOR HEALTH CARE ADMINISTRATION, as the successor in interest to, SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Petitioner,

versus

LEXEN PITTMAN, by his next friend, Ramona Pope,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

APPENDIX
VOLUME I

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN,

Plaintiff

CASE NO. 93-6461

by his next friend,
Ramona Pope

MAGISTRATE JUDGE
SELTZER

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant.

_____/

PLAINTIFF'S ORIGINAL COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION (INCLUDING CITATION OF AUTHORITY)

To the Honorable Judge of said Court:

1. This is an action for declaratory and injunctive relief to enforce the obligation of the Florida medicaid agency to provide transplant services for Plaintiff.

2. Plaintiff Lexen Pittman resides in Broward County, Florida. His next friend is his mother Ramona Pope. Plaintiff is a Florida medicaid recipient.

3. Defendant Secretary of the Florida Department of Health and Rehabilitative Services (HRS) is responsible

for the overall operation of the medicaid agency. He is being sued in his official capacity only.

4. Plaintiff invokes the jurisdiction of this Court under 28 U.S.C. § 1331, 1343 and 2201, et seq.

5. Plaintiff's claims are brought under 42 U.S.C.§ 1983 to redress violations by the Florida medicaid agency of its obligation under the medicaid provisions of the Social Security Act, 42 U.S.C. § 1396, et seq. For brevity these provisions will be referred to as the Medicaid Act.

6. Plaintiff Lexen Pittman is a 13-month-old infant who suffers from short-bowel syndrome. His life is sustained by intravenous feeding in the form of total parenteral nutrition (TPN). The TPN compromises his liver function and will eventually result in liver failure. Lexen has had numerous hospitalizations at Broward County General Hospital for various reasons, including infections, central line supsis, and internal bleeding. He requires comprehensive transplant services for a liver/intestine transplant. It is critical that he begin the evaluation process with the University of Pittsburgh

transplant program as soon as possible so that he can be placed on the active transplant waiting list at the Children's Hospital of Pittsburgh.

7. The Plaintiff's mother applied for transplant coverage with Florida HRS, but the agency has denied coverage claiming that liver/intestine transplants are experimental. The position taken by the agency was rejected by this Court last year in a preliminary injunction opinion. McLaughlin v. Williams, 801 F.Supp. 633 (S.D. Fla. 1992).

8. The denial of coverage by HRS violates the Medicaid Act. As the Court found in McLaughlin, supra. the EPSDT provisions of the Medicaid Act mandate coverage of all medically necessary care for recipients under the age of 21. McLaughlin, at p. 637, ftn. 3, and p. 643, ftn. 12.

9. Florida medicaid's position that liver/intestine transplants are experimental will not withstand examination. The exhaustive opinion in McLaughlin furnishes detailed evidence and reasoning on this point.

10. A significant development of the past year is that the cost of a liver/intestine transplant and associated services has on the average decreased. Charges in excess of $500,000.00 for inpatient care had been the norm, but because of faster recoveries by many patients, Children's Hospital of Pittsburgh has been able to reduce its financial requirements. For example, in the Texas medicaid case on liver/intestine reimbursement (Baca v. Ladd, U.S. District Court, San Antonio, No. CA 93-55), CHP of Pittsburgh and Texas medicaid negotiated a DRG which resulted in a reimbursement amount of approximately $309,000, with an outlier for additional payment for patients requiring an unusually long inpatient stay.

11. Irreparable injury will result unless this Court issues its preliminary injunction. Lexen Pittman is in a very fragile position; he is subject to many health risks, including even common viruses, which could in the interim prove fatal.

12. Plaintiff has a strong likelihood of prevailing on the merits. This case meets the requirements of Canal

Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974). Please see also the Fourth Circuit's discussion of preliminary injunctive relief in a medicaid liver transplant case. Todd v. Sorrell, 841 F.2d 87 (4th Cir. 1988).

13. Plaintiff Lexen Pittman requests the following relief:

(1) a telephone status conference with the Court and Florida HRS lawyers to discuss details for an early hearing on preliminary injunction; plaintiff requests that the conference be arranged to occur approximately two days after filing of these papers;

(2) a preliminary injunction requiring the defendant Secretary to provide medically necessary comprehensive liver/intestine transplant services for Plaintiff, including but not limited to pre-transplant evaluation and other diagnostic services; transportation for Plaintiff and his mother; transplants; outpatient and other posttransplant services and drugs.

The Secretary should be required to immediately make the required financial authorizations to the Children Hospital of Pittsburgh, the University of Pittsburgh transplant physicians, and any other necessary health care providers, including air ambulance providers;

(3) a permanent injunction containing the same provision as in (2), above;

(4) a declaratory judgement finding the transplant coverage policies of the Florida medicaid agency to be in violation of the Medicaid act;

(5) an award of attorney's fees pursuant to 42 U.S.C. § 1988;

(6) an award of court costs;

(7) and such other and further relief to which plaintiff may be entitled.

Respectfully submitted,

/s/ Mary Ann Robertson
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March 16, 1993.

To Whom It May Concern:

This is regarding Lexen Pittman an infant with short bowel syndrome who was admitted to Broward General Medical Center approximately three months ago with centra line sepsis. He was treated for six weeks with IV antibiotics, eventually his bioviac catheter was replaced. Throughout his hospital course he's had problems with G.I. bleeding and has received numerous transfusions of platelets, packed red blood cells, and fresh frozen plasma. Currently his internal bleeding has been controlled with Pitressin. We feel currently his condition is much improved, we consider him stable for transfer to Pittsburgh Childrens and would consider his pending transplant operation to be his only hope for survival.

Sincerely,

/s/ Robert F. Hunt
Robert F. Hunt, D.O.
License No.: OS0005410

AFFIRMATION

Mary Anne Robertson, an attorney of record for plaintiff, hereby affirms that the facts contained in the foregoing instrument are true and correct.

/s/ Mary Anne Robertson
MARY ANNE ROBERTSON

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

LEXEN PITTMAN,

Plaintiff,

by his next friend,
Ramona Pope

CASE NO. 93-6461

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES

Defendant.

_____/

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO THE GRANTING OF A PRELIMINARY INJUNCTION

I. Statement of the Case

This suit challenges the Florida Medicaid Program policy of excluding liver-bowel transplants for persons under 21 years of age from the scope of services covered by the Program. The Program is administered by the Florida Department of Health and Rehabilitation pursuant to Section 409.902 et seq, Florida Statutes and Title XIX of the Social Security Act ("The Medicaid Act", 42 U.S.C. Section 1396 et seq). Lt. Governor Buddy MacKay is the

Acting Secretary of the Department of Health and Rehabilitative Services.

II. Facts

The facts are not in serious dispute. Plaintiff Lexen Pittman is a 13 month old Medicaid recipient living in Ft. Lauderdale, Florida. Medical records on the Plaintiff were requested by MEDICAID.

MEDICAID has not received current hospital records on the Plaintiff and cannot represent to the court what the child's current medical condition is.

On April 12, 1993, MEDICAID advised the Plaintiff's mother, that it could not pay for the operation.

According to the Complaint, the Plaintiff is in need of a liver-bowel transplant (Paragraph 6). The Florida Medical Assistance State Plan provides coverage for certain transplants, but not liver-bowel transplants. Plaintiff seeks the issuance of a preliminary injunction requiring the Defendant to issue a financial guarantee to the Children's Hospital of Pittsburgh to cover all services necessary for a liver/bowel transplant.

III. Statutory and Regulatory Background

The Medicaid Act, enacted in 1965, established a cooperative federal-state public assistance program to

make federal funds available to states electing to furnish medical services in accordance with the specific provision of their state plans to certain needy individuals. 42 U.S.C. Section 1396a. States that participate in the Medicaid program must fund seven categories of mandatory medical services. 42 U.S.C. Section 1396 (a) (10) (A). These mandatory services include inpatient and outpatient hospital services, other laboratory and x-ray services, early periodic screening diagnosis and treatment ("EPSDT") for individuals under 21 as described in [42 U.S. C. Section 1396d(r)], and physicians' services. In addition, subject to Section 1396d(r), states may, at their option, cover other categories of medical services described in the Act. Id. Section 1396 (i) establishes general limitation on the scope of covered services for which federal financial assistance is available and therefore for services which are permitted to be covered under the Act.

Section 1396b(i) provides:

> Payment under the preceding provisions of this section shall not be made --
>
> (1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that --

(A) similarly situated individuals are treated alike:
and;

(B) any restriction, on facilities or practitioners which may provide such procedures, is consistent with the accessibility of high quality care to individuals eligible for the procedures under the State plan; or

(2) with respect to any amount expended for an item or service (other than an emergency item or service, not including items or services furnished in an emergency room of a hospital) furnished [by or at the direction of a provider who has been suspended from participation in the Medicare or Medicaid program]. . .

(3) with respect to any amount expended for inpatient hospital services furnished under the plan [which exceeds the hospital's usual and customary charges] . . . or

(4) with respect for any amount expended for care or services furnished under the plan by a hospital unless such hospital has in effect a utilization review plan. . . or

(5) with respect to any amount expended for ~~any drug~~ product for which payment may not be made [pursuant to certain Medicare requirements]. . . or

(6) with respect to any amount expended for inpatient hospital tests. . . not specifically ordered by the attending physician. . .or . . .

Nothing in paragraph (1) shall be construed as permitting a State to provide services under its plan under this title that are not reasonable in amount, duration, and scope to achieve their purposes.

Finally, EPSDT services, included in the Medicaid Act as a required covered service pursuant to Section 1396d(a) and Section 1396(a) (10) are described in Section 1396d(r) to include:

> Such other necessary health care, diagnostic services, treatment and other measures described in Section [1396d(a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.
>
> Section 1396d(r) (5).

IV. Issues

A. Whether Congress in enacting Title XIX of the Social Security Act gave the States the option not to cover organ transplant services?

B. Whether the enactment of the "Early and Periodic Screening Diagnostic and Treatment" (EPSDT) amendments of 1989 repealed the option of the States not to include organ transplants as a covered service?

C. If the Court decides that Florida's Medicaid program must give a financial guarantee to Children's Hospital of Pittsburgh, whether such guarantee is to be in any amount sought by Pittsburgh or

limited to the out of state hospitalization rate established by Medicaid?

D. If the Florida Medicaid program is ordered to give a financial guarantee to Pittsburgh, whether LEXEN PITTMAN can be moved out of State and operated on without further Order of Court?

V. Argument

A. States Are Not Required to Fund Any Organ Transplants Under the Medicaid Act

Plaintiffs contend that a state medicaid program must fund organ transplants because they are medically necessary (see Complaint 6) and the denial of funding for such services constitutes a violation of the Medicaid Act. (Complaint 8). These arguments erroneously, presume, that the Medicaid Act requires states to cover organ transplants in their Medical Assistance Plans. Indeed, in 1985 and again in 1987, Congress amended the Medicaid Act to specifically limit payments for organ transplants unless the State Plan provides for written standards respecting coverage of such procedures. Section 1396(i)(1). As noted above, the Florida Medicaid Plan does not include standards for liver-bowel transplants.

It is significant not only that Congress chose to limit payment for transplants, but also the manner in which it chose to do so. Specifically, Congress amended general statutes establishing limitations on payments for various services otherwise included in the Medicaid Act. For example, Section 1396b(i) (2) provides that physician's services, which must otherwise be covered under the Act, will not be funded if they are rendered by a physician who has been excluded from participation in the Medicaid program (for example, due to fraudulent billings). The Medicaid Act provides for the federal department of Health and Human Services to pay to each state federal matching funds for expenditures that the state makes for medical services under its plan. Section 1396(a) (1). Thus, if the Act provides that no federal payments will be made for any item, a state may not include that item in its plan. As no federal funds are available for items listed under Section 1396b(i), they cannot be included in a state's medical assistance plan.

While most of the items listed in Section 1396b(i) place-conditions on payment for certain services (i.e. payments only available for hospital services if the hospital has a utilization review plan, Section 1396b(a)

(4)), Section 1396b(i) (1) places an absolute limitation on payment unless a state includes written standards in its plan for transplants. In other words, Congress, in enacting Section 1396b(i) (1), vested in states the absolute discretion to determine whether and to what extent they will cover transplants. This discretion is subject only to the last paragraph of Section 1396b(i), which requires states which do provide transplants to do so in a reasonable manner. Consequently, organ transplants are services which can only be covered if a state decides to include them in its state plan.

The legislative history underlying Section 1396b(i) supports this interpretation. The 1985 House Report indicates that the Committee "believes the decision to extend Medicaid coverage for one or more organ transplant procedures is appropriately within the province of each state." H. Rep. No. 265, 99th Congress, 1st Sess. 73-75 (185) (See Attachment 1 hereto). The Report further acknowledges that, with the 1985 amendment, "states are not required to cover any organ transplant procedures" and can justifiably limit the facility or practitioner providing any transplant for which the written standards exist in the plan because of "the

extraordinary expense and complexity of these procedures." Id.

In sum, by limiting payment for organ transplants in the manner in which it did, Congress placed in states' hands the determination of whether organ transplants could be considered "covered services" under the Medicaid Act. If a state includes standards in its plan, transplants are a Medicaid service. If a state does not, transplants are not a Medicaid service by the express language of Section 1396b(i).

The cases on which plaintiffs rely are inapposite because none of them involve the issue of whether a service is covered under the act.

In McLaughlin v. Williams, 801 F. Supp. 633 (S.D. Fla. 1992) the Court assumed without deciding that transplants "were a mandatory services enumerated in Section 1396d(a) and therefore must be covered if medically necessary.

McLaughlin supra is not the only organ transplant case decided by a Federal Court in Florida.

The first case was Lisa Cooley v. Robert Williams, (N.D. Fla. 1991). No order on the Court's ruling was entered. Instead the transcript of hearing

shows that a preliminary injunction to compel Medicaid to fund a liver-bowel transplant for a child was denied. Although the case is not reported in the Federal Supplement, it is reported in Commerce Clearing House's "Medicare and Medicaid Guide" at paragraph 40, 916.

After Judge Stafford denied a preliminary injunction, no appeal was taken.

After McLaughlin, the next organ transplant case was James Alderman v. Robert Williams, (M.D. Fla. 1992).

In this case, Judge Schlesinger denied a preliminary injunction which sought Medicaid funding for an adult heart transplant. The Court found that the States had the option under Medicaid not to fund organ transplants. An appeal was taken but abandoned when the Plaintiff sought remand to the trial court. Defendant's Motion for Final Summary Judgment has not been ruled upon. A copy of the Order is Attachment 2 hereto.

A case which has addressed the issue of whether transplants are "covered services" under the Act is Ellis by Ellis v. Patterson, 859 F.2d 52 (8th Cir. 1988). In

Ellis, the Court concluded that Section 1396b(i) (1) gives to states the discretion whether or not to include organ transplants in their Medicaid plans. Id. at 55. In Ellis, the Court concluded that Arkansas was not required to fund organ transplants under Medicaid, and that it may choose which kinds of organ transplants, if any, to cover. The Court noted that other limitation on medically necessary services have been permitted and are reasonable. Id.

Indeed, pursuant to Section 1396d(a) dental services may be covered by states at their option. Therefore, if a state opts, for example, not to cover dental services, the fact that a particular dental service is medically necessary for a particular individual is irrelevant to the question of whether the state is required to cover that service.

Similarly, Section 1396b(i) establishes limitations on payment for services. Therefore, if an individual receives non-emergency treatment from a physician who has been excluded from participation in the Medicaid program, the fact that the treatment was medically necessary is irrelevant to the question of whether the

treatment can be funded by a state under its plan. See Section 1396b(i) (2).

By the same token, Section 1396b(i) (1) prohibits payment for organ transplants unless written standards are included in the plan. As with the foregoing examples, absent written standards, the service is not covered. The medical necessity of a particular transplant is irrelevant to the issue presented to this Court: whether liver-bowel transplants for persons under age 21 are required of the Florida Medicaid State Plan pursuant to the provisions of Section 1396b(i) (1). The answer is clear: they are not. Consequently, the Florida Medicaid program is not required to fund liver-bowel transplants for persons under age 21.

The Eighth Circuit in Ellis articulated the following rationale:

> [P]laintiff's position that all organ transplants. . . must be covered by Medicaid is unrealistic. Surely Congress did not require the states to provide funds for exotic surgeries which while they might be the individual patient's only hope for survival, would also have a small chance of success and carry an enormous price tag. Medicaid was not designed to fund risky, unproven procedures, but to provide the largest number of necessary medical services to the greatest number of needy people.

Ellis, 859 F.2d at 55. By leaving the decisions with states, Congress permitted each state to develop criteria for transplants which, in its view, ensured the greatest benefit for each Medicaid dollar.

In a recent decision decided on August 18, 1992 the Ninth Circuit in Dexter v. Kirschner, 972 F.2d 1113, held that the State of Arizona could limit the types of transplants it funded under the Medicaid program as Congress intended payments for organ transplants to be discretionary.

The Court held that a State could distinguish between allergenic and autologous bone marrow transplants for Medicaid coverage purposes observing that transplants deal with State regulations in the social and economic filed, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some desparity. . . the Court states:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws imperfect. If the classification has some reasonable basis; it does not offend the Constitution simple because the classification 'is not made with mathematical nicety or because in practice it results in some

> inequality.' Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 161, 25 L.Ed.2d. 491 (1970) (involving statutes that provides Aid to Families With Dependent Children) (quoting Lindsley v. Natural Carbonic Gas Co.., 220 U.S. 61, 78,l 41 S.Ct. 337, 340,55 L.Ed. 369 (1911). Moreover, " '[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " Id. (quoting McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)."

In this case Florida has determined that it will not cover liver bowel transplants.

Salgado v. Kirschner, 836 P.2d 995 (Ariz. App. 1992) addressed the issue of whether or not the state, could deny liver transplant to a recipient over eighteen when its plan provides for liver transplant to those under the age of eighteen.

In this case the Court held:

> Age is, of course, a clear principle that can be consistently applied. Nor is youth an unreasonable or arbitrary factor in spending public funds. If the state is free not to fund any transplants, we see nothing unreasonable in spending some to benefit those who will have the longest remaining life as a result of the procedure. See Kantrowitz v. Weinberger, 388 F.Supp. 1127 (D.D.C. 1974), aff'd 530 F.2d 1034 (D.C. Cir. 1976). There being a rational basis for the statutory differentiation, plaintiffs' equal protection claims under the state and federal constitutions also fails. McGowan v. Maryland, 366 U.S. 420, 815

S.Ct. 1101, 6 L.Ed. 2d 393 (1961); Bryant v. Continental Conveyor Equipment Co., 156 Ariz. 193, 751 P.2d 509 (1988).

Therefore, the judgment of the trial court denying the liver transplant operation was affirmed.

States in their Medicaid plans are free not to fund any transplant operations or in limiting the benefit to those who will have the longest remaining life as a result.

Therefore, the Plaintiff's motion for a preliminary injunction should be denied.

B. The passage of the EPSDT amendments in 1989 did not indicate a Congressional intent to repeal the option of States to exclude certain types of organ transplants (Section 1902).

Congress in passing the EPSDT amendments of 1989 sought to have preschool children screened for certain types of conditions, eye, dental, blood, etc. 42 U.S.C. 1396d(r). If abnormalities were detected by the screens, then those conditions were to be alleviated whether or not, otherwise provided for by Medicaid.

This is made clear by the legislative history of the EPSDT amendments. The House Conference Report 101-386 on the EPSDT amendments, as reprinted in U.S.

Code and Administrative News 101st Congress, 1989, pages 3056 and 3057 states:

> "Conference agreement
>
> The conference agreement follows the House bill with the following modifications: (1) States are required to provide any service that a State is allowed to cover with Federal matching funds under Medicaid that is required to treat a condition identified during a screen, whether or not the service is included in the State's Medicaid program. . . "

A short bowel syndrome is not one of the conditions that EPSDT screens for. The condition would be discoverable upon birth. A short bowel syndrome was not one of the conditions, Congress intended to alleviate with the passage of the EPSDT amendments. A copy of the conference report is attached as attachment 3.

In a similar case recently, the District Court for the Western District of Wisconsin held that the State did not have to cover the costs of any transplant procedure through its medical assistance program, including those under the age of 21. Tiffany Miller v. Gerald Whitburn, Case No. 93-C-096-C, March 24, 1993. A copy is attached as attachment 3.

The Court stated that the state's decision not to fund certain types of organ transplants was non-reviewable. (Page 7).

Medicaid has promulgated a Rule under the Florida Administrative Code, Rule 10(c) .039, which specifies which organ transplants are covered services. A liver-bowel transplant operation is not a covered service.

C. If the Court requires the posting of a financial guarantee to the Children's Hospital of Pittsburgh, then the guarantee should be limited to the Medicaid out of state hospitalization rate.

If the Court wishes to preserve the status quo of the parties, pending a decision on the merits, then the guarantee should not be a blank check.

The Court in Natalia Pereira v. Bruce Kosjlowski, 805 F.Supp. 361 (E.D. Va 1992) stated on page 10 of the Order granting Plaintiff's Motion for Summary Final Judgment, "This Court will not order the commonwealth to write a blank check and allow the Children's Hospital in Pittsburgh to fill in any amount the determine to be reasonable."

In that case, the Medical College of Virginia was capable of performing a heart transplant for a child, but

the parents preferred the hospital at Pittsburgh. The Court noted on page 9 of the Order, "This tremendous financial burden will not be absorbed by the state, but by other potential Medicaid recipients."

The Florida Medicaid program would request that, if the Court orders financial guarantees by given, that State officials not be put in the position of having to give Pittsburgh any amount demanded under threat of contempt of court.

D. If the Court Order that financial guarantees be given, then the case should not be made moot by the Plaintiff being flown to Pittsburgh and operated on without further order of court.

After McLaughlin supra required that financial guarantees be posted so that the child could be put n the waiting list, he was flown to Pittsburgh and operated on, not once, but twice. JULIAN MCLAUGHLIN died after the second operation. Thus, the case was not decided on its merits.

VI. Conclusion

Even if the Plaintiff demonstrates that he would suffer irreparable form if the temporary restraining order

were denied, he has failed to show any likelihood of ultimate success on the merits.

Plaintiff has not shown that the Secretary has violated any provision of the federal Medicaid Act. Congress has left the discretion whether to fund any particular transplant operation to the states and the State of Florida has made the decision in writing not to include liver-bowel transplant operations as a covered service.

Respectfully submitted,

/s/ Karel Baarslag
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail and Federal Express this 7th day of June, 1993 to Mary Anne Robertson, Legal Aid Service of Broward County, 609 S.W. First Avenue, Ft. Lauderdale, Florida, 33301-1885 and William Kimble, 554 S. Summit No. 502, Ft. Worth, Texas, 76104.

/s/ Karel Baarslag
KAREL BAARSLAG, ESQUIRE

99TH CONGRESS REPT. 99-265
1st Session HOUSE OF REPRESENTATIVES Part 1

MEDICARE AND MEDICAID BUDGET RECONCILIATION AMENDMENTS OF 1985

September 11, 1985 - Ordered to be printed

MR. DINGELL, from the Committee on Energy and Commerce, submitted the following

REPORT

together with

MINORITY VIEWS

(To accompany H.R. 3101 which on July 30, 1985, was divided and referred to as follows: Section 1 and titles I and II to the Committee on Energy and Commerce; section 1 and title I to the Committee on Ways and Means)

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce to whom was referred the bill (H.R. 3101) to amend titles XVIII and XIX of the Social Security Act to provide for budget reconciliation, and improvements, with respect to the Medicare and Medicaid Programs, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1, SHORT TITLE: TABLE OF CONTENTS.

This Act may be cited as the "Medicare and Medicaid Budget Reconciliation Amendments of 1985".

TABLE OF CONTENTS

Sec. 1. Short title; table of contents

TITLE I — MEDICARE PROGRAM

PART A — CHANGES RELATING PRIMARILY TO PART B OF THE MEDICARE PROGRAM

Group 1

Sec. 101. Extension of physician fee freeze for non-participating physicians and improvements in the participating physician program.

"(2) For purposes of this subsection, a 'medicaid qualifying trust' is a true, or similar legal device, established by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust, and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.

"(3) This subsection shall apply without regard to --

"(A) whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this title, or

"(B) whether or not the discretion described in paragraph (2) is actually exercised."

(b) EFFECTIVE DATE — The amendment made by subsection (a) shall apply to medical assistance furnished on or after the first day of the second month beginning after the date of the enactment of this Act.

SEC. 206. WRITTEN STANDARDS FOR PROVISION OF ORGAN TRANSPLANTS.

(a) DENIAL OF FEDERAL PAYMENTS FOR ORGAN TRANSPLANTS UNLESS PROVIDED UNDER WRITTEN STANDARDS — Section 1903(i) of the Social Security Act (42 U.S.C. 1396(i)) is amended by inserting before paragraph (2) the following new paragraph:

"(1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that --

"(A) similarly situated individuals are treated alike, and

"(B) any restriction, on the facilities or practitioners which may provide such procedures, is consistent with the accessibility of high quality care to individuals eligible for the procedures under the State plan".

(b) EFFECTIVE DATE — The amendments made by subsection (a) shall apply to medical assistance furnished on or after July 1, 1986.

SEC. 207. DEEMED RESIDENCE FOR OUT-OF-STATE ADOPTIVE AND FOSTER CARE PLACEMENTS.

(a) GENERAL RULE — Section 1902(b) of the Social Security Act 42 U.S.C. 1396a(b) is amended by adding at the end the following:

"For purposes of this title, any individual receiving aid or assistance under any plan of a State approved under part E of title IV shall be deemed to be receiving such aid or assistance from the State in which the individual actually resides."

(b) EFFECTIVE DATE — The amendment made by subsection (a) shall apply to medical assistance furnished on or after the first calendar quarter that begins more than 90 days after the date of the enactment of this Act.

SEC. 208. EXTENSION OF MMIS DEADLINE.

(a) NEW DEADLINE — Section 1903(r)(1)(B) of the Social Security Act (42 U.S.C. 1396b(r)(l)(B) is amended by striking out "the earlier of" and all that follows through the end of subparagraph (B) and inserting in lieu thereof "September 30, 1985".

(b) EFFECTIVE DATE — The amendment made by subsection (a) shall apply to payment under section 1930(a) of the Social Security Act for calendar quarters beginning on or after October 1, 1982.

SEC. 209. EXTENSION OF CERTAIN WAIVER PROJECT.

(a) CONTINUED APPROVAL — Notwithstanding any limitations contained in section 1115 of the Social Security Act but subject to subsection (b) of this section, the Secretary of Health and Human Services, upon application, shall continue approval of demonstration project number 11-P-9747376-06 ("Modifications under the Texas System of Care for the Elderly: Alternatives to the Institutionalized Aged"), previously approved under that section, until December 31, 1988.

(b) TERMS AND CONDITIONS — The Secretary's continued approval of the project under subsection (a) —

(1) shall be on the same terms and conditions as applied to the project as of the date of the enactment of this Act, and

(2) shall remain in effect until such time as the Secretary finds that the applicant no longer complies with such terms and conditions.

SEC. 210. REPORT ON ADJUSTMENT IN MEDICAID PAYMENTS FOR HOSPITALS SERVING DISPROPORTIONATE NUMBERS OF LOW INCOME PATIENTS.

The Secretary of Health and Human Resources shall transmit to Congress, not later than July 1, 1986, a report that —

(1) describes the methodology used by States under section 1920(a)(13)(A) of the Social Security Act, in their making payments to hospitals, in taking into

The Committee bill would apply in those States that automatically extend Medicaid benefits to SSI recipients and those that do not. It would apply to all applicants and beneficiaries, whether categorically needy, optional categorically needy, or medically needy. The provisions does not, however, authorize States to apply standards more restrictive than those set forth in the Committee bill to beneficiaries of Medicaid qualifying trusts, such as deeming available to a beneficiary asset that have been irrevocably placed in trust and over which the trustee can exercise no discretion whatsoever. Similarly, the Committee bill does not authorize States to treat as resources for Medicaid eligibility purposes the assets in other types of irrevocable trusts, such as those established solely for the benefit of disabled children.

The provision is effective for Medicaid payments made on or after the first day of the second month after enactment. Thus, Medicaid qualifying trusts that have already been established, as well as those that may be created in the future, would be subject to the provision. The Committee is aware that the applicability of this provision to trusts already established may cause some disruption in the financial affairs of the grantors. However, the Committee is persuaded that this disadvantage is greatly outweighed by the restoration of fiscal integrity to the Medicaid program that this provision will accomplish.

Written standards for provisions of organ transplants (sec.206)

Under current law, States are required to cover certain services, such as inpatient hospital and physician services, in an amount, duration, and scope sufficient to reasonably achieve their purpose. States may not

arbitrarily deny or reduce the amount, duration, or scope of a required service to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition. Although organ transplant procedures necessarily involve inpatient hospital, physician, and other required services, State limitations on the provision of these required services in the case of individuals requiring organ transplants are not viewed as arbitrary due to the unique nature and extraordinary costs of such procedures. Thus, States may elect to cover non-experimental, non-cosmetic organ transplant procedures under their Medicaid programs and receive Federal matching funds.

According to a survey conducted by the Intergovernmental Health Policy Project and the Health Care Financing Administration in April, 1985, a total of 18 States reported having no formal guidelines or policies governing reimbursement for organ transplants. (The States are Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Kentucky, Maine, Mississippi, Montana, Nevada, New Hampshire, North Dakota, South Carolina, Virginia, Washington, West Virginia, and Wisconsin). Most States with no formal guidelines have reimbursed for transplants on an ad hoc basis, or according to informal criteria developed within the State Medicaid agency.

While the Committee believes that the decision to extend Medicaid coverage for one or more organ transplant procedures is appropriately within the province of each State, the Committee does not believe that this decision can equitably be made on an ad hoc, case-by-case basis. There is, in the Committee's view, no justification for a State to deny payment for a particular transplant procedure to one Medicaid beneficiary and to approve payment for that same procedure for another, similarly situated beneficiary. Access to organ transplant coverage should not dependent upon a family's ability to draw sympathetic media coverage or favorable dispensation from elected officials.

The Committee bill therefore requires that, in order to receive Federal Medicaid matching payments for organ transplant procedures after July 1, 1986, a State must have written standards, set forth in its Medicaid plan, regarding the coverage of such procedures. These standards must provide that similarly situated individuals are treated alike — that is, that the State's criteria are applied fairly and uniformly to all individuals eligible for Medicaid in the State. The standards, which may include medical patient selection criteria, must be reasonable.

The Committee wishes to emphasize that its bill does not require a State to cover any organ transplant procedures. Under the bill, States also have the discretion to cover some procedures, such as heart or heart-lung transplants. However, if a State decides to cover any procedures, it must establish formal written standards and apply them fairly and uniformly.

Under the Committee bill, a State may limit the facilities or practitioners to whom it will make payment for the organ transplant procedures it chooses to cover. In view of the extraordinary expense and complexity of these procedures, a State could justifiably decide to commit its resources only to those facilities and practitioners of demonstrated excellence with regard to a particular procedure, whether located in that State or not. If a State chooses to restrict the facilities or practitioners in this manner, it must assure that the designated providers render high quality care and that they are accessible, through transportation arrangements made or paid for by the State, to all Medicaid beneficiaries throughout the State.

Deemed residence for out-of-State adoptive and foster care placements (Sec. 207)

Under current law, children with respect to whom adoption assistance or foster care payments are made under Title IV-E of the Social Security Act (unreadable Page 26) for Medicaid as categorically needy

beneficiaries. The State which makes the Title IV-E payment is also the State provides the Medicaid coverage.

In the case of out-of-State adoption assistance or foster care placements, providers may be unwilling to accept an out-of-State Medicaid care, unnecessarily jeopardizing the child's access to needed medical services. This can be a particularly serious problem for children receiving adoption assistance payments, many of whom have handicapping conditions. Recognizing this problem, the American Public Welfare Association, which represents State Medicaid directors, has developed an Interstate Compact on Adoption and Medical Assistance which provides that children receiving adoption assistance payments are eligible to receive Medicaid benefits from the State in which they live. In the view of the Commit-

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES ALDERMAN,

Plaintiff, Case No. 92-1388-Civ-T-99C

vs.

ROBERT B. WILLIAMS,

Defendant.

ORDER

This cause is before the Court on the Plaintiff's Motion for Preliminary Injunction, filed September 24, 1992 (Doc. No. 1). The Court held a hearing on the motion on September 29, 1992 after granting the Plaintiff's Motion for Temporary Restraining Order on September 25, 1992. Both parties were represented and had an opportunity to present argument and evidence to the Court at the hearing held September 29, 1992.

The underlying facts in this matter have not changed since the Court granted the Motion For Temporary Restraining Order on September 25, 1992. The Plaintiff is a thirty-nine year old Medicaid recipient apparently in desperate need of a heart transplant. He

seeks a preliminary injunction requiring the Defendant to provide immediate funding from Medicaid for comprehensive transplant services in the form of a written financial guarantee from the Defendant. The guarantee will enable the Plaintiff to be placed on the active heart transplant list. The Defendant has a written policy that it does not provide funding for heart transplants for Medicaid recipients over the age of twenty-one. See Fla. Admin Code § 10C-7.039 (1992). The Court granted the Plaintiff's Motion For Temporary Restraining Order because it had not been presented any rationale for the Defendant's policy, except for funding reasons, and it therefore appeared to the Court at the time that the Defendant's policy was arbitrary.

A party seeking injunctive relief bears the burden of establishing four criteria: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury in the absence of injunctive relief; (3) a balance of hardships favoring the movant; and (4) the advancement of some discernible public interest by entering injunctive relief. Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974).

Once a state elects to participate in the Medicaid program, it must comply with federal requirements. See 42 U.S.C. § 1396a: Dexter v. Kirschner, 1992 WL 196405 (9th Cir. Aug. 18, 1992). A state is required to provide five general categories of medical treatment: (1) inpatient hospital services; (2) outpatient hospital services; (3) laboratory and x-ray services; (4) skilled nursing services; and (5) physician services. 42 U.S.C. §§ 1396a(1), 1996d(a). Furthermore, a state "may not arbitrarily deny or reduce the amount, duration, or scope of a required service. . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c).

A specific requirement of 42 U.S.C. §§ 1396a(1) and 1396d(a) (4) (B) is that a state provide "early and periodic screening, diagnostic, and treatment ["EPSDT"] services (as defined in subsection (r) of this section) for individuals who are eligible under the plan and are under the age of 21." 42 U.S.C. § 1396d(a) (4) (B). Subsection (r) was added to Section 1396d in 1989 and provides in relevant part that mandated EPSDT services include:

> [s]uch other necessary health care, diagnostic services, treatment and other measures described in subsection (a) of this section to

> correct or ameliorate defects and physical illnesses and conditions discovered by the screening services, whether or not such services are covered under the state plan.

42 U.S.C. § 1396d (r) (5).

As the Court noted in its September 25, 1992 Order, states do have some discretion in determining which medical services to cover under their Medicaid program. Dexter, 1992 WL at 196405; Meusberger v. Palmer, 900 F.2d 1280, 1282 (8th Cir. 1990). State Medicaid plans need not fund organ transplants, 42 U.S.C. § 1396b(i), even when they are medically necessary. Meusberger, 900 F.2d at 1282; Ellis v. Patterson, 859 F.2d 52 (8th Cir. 1988). Moreover, states may elect which, if any, organ transplants to cover. Id. However, once a state has adopted a policy to cover a category of organ transplants, it may not arbitrarily or unreasonably deny services to an otherwise eligible Medicaid recipient. Id.

The main issue before the Court at this time is whether the Plaintiff has a substantial likelihood of success on the merits of his claim that the state must fund a heart transplant for him. At the hearing held September 29, 1992, the Defendant presented evidence

that it formulated a policy on heart transplants for fiscal reasons: there is simply not enough money available to fund all heart transplants for eligible Medicaid recipients. The Florida Legislature has only appropriated funds for heart transplants for people under twenty-one. According to Jan Temkin, Program Administrator for Medicaid in Florida, the Defendant's decision to fund only heart transplants for Medicaid recipients under twenty-one was based on the 1989 amendment to 42 U.S.C. § 1396d quoted above. The statute clearly requires a state participating in the Medicaid program to provide more services to Medicaid recipients under twenty-one than to other Medicaid recipients. See 42 U.S.C. § 1396d(r). 42 C.F.R. § 441.57 echoes the Medicaid statute's distinction between recipients under twenty-one and recipients over twenty-one. It provides:

> Under the EPSDT program, the [state] may provide for any other medical or remedial care specified in Part 440 of this subchapter, even if the [state] does not otherwise provide for these services to other recipients or provides for them in a lesser amount, duration, or scope.

42 C.F.R. § 441.57.

In light of Congress' determination that Medicaid recipients under twenty-one should receive more services

than other Medicaid recipients, the Court is unable to conclude that Florida's decision to allocate the limited public funds available for heart transplants to those Medicaid recipients under twenty-one is arbitrary or unreasonable and hence violative of the Medicaid statutory scheme. The Plaintiff argues that Rush v. Parham, 625 F.2d 1150 (5th Cir. 1980) requires Florida to fund all non-experimental medically necessary procedures, including organ transplants. However, Rush is inapposite. In Rush, an organ transplant was not the procedure in question and there was not a specific provision in the Medicaid statute, as there is in this case with respect to organ transplants, that allowed the state to choose whether to cover the procedure at issue.

The Plaintiff's equal protection argument also must fail. 42 U.S.C. § 1396b(i) precludes payment for organ transplants unless made pursuant to written state standards ensuring that "similarly situated individuals are treated alike." 42 U.S.C. § 1396b(i). The intent of this provision was "to assure that State coverage decisions for organ transplants are based on clear principles consistently applied, and not on political or media considerations." Ellis, 859 F.2d at 55. See also Meusberger, 900 F.2d at

1283 ("purpose of provision is to provide objective criteria, subject to challenge as being arbitrary or unreasonable"). Although Salgado v. Kirschner, 1992 WL 5926 (Ariz.App) is not a binding case on this Court, the Court agrees with the observation that age is a clear principle that can be consistently applied. Gregory v. Ashcroft, 111 S.Ct. 2395, 2407 (1991). Moreover, the Court notes that age classifications are not per se invalid, see e.g. Jefferson v. Hackney, 406 U.S. 535 (1972), and youth is not an unreasonable or arbitrary factor in spending limited public funds. See Kantrowitz v. Weinberger, 388 F. Supp. 1127 (D.D.C. 1974), aff'd 530 F.2d 1034 (D.D.Cir. 1976). Since a rational basis exists for the differentiation between Medicaid recipients in this case, there is no equal protection violation. Gregory, 111 S.Ct. at 2406; McGowan v. Maryland, 366 U.S. 420 (1961).

The Plaintiff also contends that the Defendant's refusal to provide funding for a heart transplant violates the recently enacted Americans With Disabilities Act, 42 U.S.C. 12101, et seq. The relevant portion of the Act, 42 U.S.C. § 12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from

> participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

A "qualified individual with a disability" is defined as:

> an individual with a disability who, with or without reasonable modifications to rules, policies or practices, the removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

The Court believes that the Americans With Disabilities Act does not offer the Plaintiff relief because the decision to not fund his heart transplant was indisputably based on his age, not the fact that he is disabled. As discussed above, it is reasonable for Florida to use Medicaid recipients' age as the objective critical in allocating public funds for heart transplants.

In its Order granting a temporary restraining order, the Court observed that it had not at that time been presented a rationale for the state's policy and that the policy therefore appeared arbitrary. The Court has now

been presented the State's rationale and, for the reasons discussed above, believes that it is not in fact arbitrary or unreasonable in light of existing law. Therefore, the Court's September 25, 1992 Order must be dissolved.

The Court doubts that there is a person in the country who would not want to order the state to fund a heart transplant for the Plaintiff. It is fundamental, though, that the "Constitution does not empower a federal court to second-guess state officials charged with the difficult task of allocating limited public welfare funds." Dexter, 1992 WL 196405; See also Dandridge v. Williams, 397 U.S. 471, 487 (1970). Unless the state officials have violated the law, or the law is changed, the Court cannot require them to fund a heart transplant.

In sum, the Plaintiff does not have a substantial likelihood of success on the merits of his claim that the state must fund a heart transplant for him and preliminary injunctive relief is therefore not appropriate. Because this case involves the Plaintiff's life, this Order will not take immediate effect in order to allow the Plaintiff the opportunity to attempt an appeal of this Order, if he so desires.

Based on the foregoing, it is ORDERED AND ADJUDGED that:

1. The Plaintiff's Motion for Preliminary Injunction, filed September 24, 1992 (Doc. No. 1), is DENIED.

2. The effect of this Order is STAYED until 5:00 P.M., Friday, October 2, 1992 in order to allow the Plaintiff to file an appeal with the United States Court of Appeals for the Eleventh Circuit and to request further emergency relief from the Court of Appeals. The terms of the emergency restraining order entered September 25, 1992 shall remain in effect until that time.

DONE AND ORDERED at Jacksonville, Florida, this 1st day of October, 1992 at 1:54 P.M.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies to:

William Kimble, Esq.
Clyde Collins, Esq.
Gordon Scott, Esq.

Note: The parties were telephonically notified of the contents of this Order.

LEGISLATIVE HISTORY
HOUSE CONF. REP. NO. 101-386
[page 453]
(C) EARLY AND PERIODIC SCREENING, DIAGNOSTIC, AND TREATMENT SERVICES DEFINED

Present law

States are required to cover early and periodic screening, diagnostic, and treatment (EPSDT) services for most groups of Medicaid beneficiaries under age 21. Medicaid regulations provide the EPSDT screenings must include a health and developmental history, a comprehensive physical exam, vision and hearing testing, appropriate laboratory tests, and dental screening for children over 3 years old (or over 5 years old, with the Secretary's approval). The regulations require that States establish, in consultation with medical and dental organizations, a "periodicity schedule" for screenings, specifying services applicable at each state of the beneficiary's life. States must also provide treatment for problems or conditions identified during screening. The regulations provide that, in addition to any treatment services normally covered under the State Medicaid plan, the State must provide dental care, appropriate immunizations, and vision and hearing treatment, including eyeglasses and hearing aids.

House bill (section 4213)

Codifies the current regulations on minimum components of EPSDT screening and treatment with minor changes. Provides that screenings must include blood testing when appropriate, as well as health education. Eliminates the option of delaying dental screening to age 5. Requires distinct periodicity schedules for screening, vision, dental, and hearing services, and provides that sservices be furnished at intervals other than those specified in the periodicity schedule when medically necesary to identify and treat a suspected illness or condition. Provides that nothing in Medicaid law should be construed as limiting EPSDT providers to those that can furnish all the required

EPSDT services or preventing providers qualified to furnish only a part of the EPSDT package from participating in the program. Requires States to report annually to the Secretary, by April 1 after the end of each fiscal year (beginning with FY 90), on the number of children receiving EPSDT screens, the number refered for follow-up treatment, and the number receiving dental services, by age and basis of Medicaid eligibility. Effective on enactment.

Senate amendment

No provision.

Conference agreement

The conference agreement follows the House bill with the following modifications: (1) States are required to provide any service that a State is allowed to cover with Federal matching funds under Medicaid that is required to treat a condition identified during a screen, whether or not the service is included in the State's Medicaid plan; (2) the Secretary is required to develop, by July 1, 1990, and every 12 months thereafter, EPSDT participation goals for each State, and States are required to include data on the extent to which they comply with these goals in their annual reports to the Secretary; and (3) the provision is effective April 1, 1990.

D. EXTENSION OF PAYMENT PROVISIONS FOR MEDICALLY NECESSARY SERVICES TO CHILDREN IN DISPROPORTIONATE SHARE HOSPITALS

Present law

(1) States may establish reasonable duration limits on coverage of inpatient hospital services, but may not impose these limits on medically necessary services provided to children under 1 year old in hospitals serving a disproportionate number of low-income patients with special needs.

(2) If the State pays for inpatient services on a prospective basis under which payment rates are established in advance and may not reflect the hospital's actual costs for covered services), the State must provide additional payment to disproportionate share hospitals for patients under 1 year old who are "outliers," that is, who incure exceptionally high costs or have long hospital stays.

House bill (section 4214)

(1) Requires States to waive durational limits for medically necessary inpatient services provided by disproprotionate share hospitals to children under age 18. Applies to payments for calendar quarters beginning on or after July 1, 1990.
(2) Requires States with prospective payment systems to submit to the Secretary by April 1, 1990, a State plan amendment providing for payment adjustments for services provided by disproportionate share hospitals after July 1, 1990, to children over age 1 but under age 18 who are outlier cases.

Senate amendment

No provision.

Conference agreement

The conference agreement does not include the House bill.

(E) REQUIRING "SECTION 209(B)" STATES TO PROVIDE MEDICAL ASSISTANCE TO DISABLED CHILDREN RECEIVING SSI BENEFITS

Present law

States are ordinarily required to provide Medicaid to any aged, blind, or disabled person receiving cash assistance under the Supplementary Security Income (SSI) program. However, section 209(b) of the Social Security Amendments of 1972 (P.L. 92-603) provided that a State could use more restrictive eligibility standards for

Medicaid than those used for SSI if the State was using those standards for Medicaid on January 1, 1972.

House bill (section 4215)

Requires all states to provide Medicaid to persons under 17 who are receiving SSI benefits. Effective July 1, 1990.

Senate amendment

No provision.

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN,

Plaintiff

CASE NO. 93-6461-CIV
ROETTGER
MAGISTRATE SELTZER

by his next friend,
Ramona Pope

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant

PLAINTIFF'S BRIEF IN SUPPORT OF HIS MOTION FOR PRELIMINARY INJUCTION

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Letter from Dr. Robert Hunt, Lexen Pittman's treating physician, dated 3/16/93 6

ARGUMENTS AND AUTHORITIES

I. NATURE OF THE STATES' OBLIGATIONS UNDER THE MEDICAID ACT

The medicaid program is arguably the most significant of the federal/state matching programs. It represents a massive commitment by the states and the federal government. By and large, this programs has been successful in delivering health care for poor people. A good description of medicaid is contained in Judge Marcus's opinion in McLaughlin v. Williams, 801 F.Supp. 633 (S.D. Fla. 1992), at p. 636. Plaintiff will not try to improve on that description, except to emphasize two points:

(1) If a state opts to participate in medicaid, it must operate a program which is in full compliance with the Medicaid Act and regulations. Mitchell v. Johnston, 701 F.2d 337 (5th Cir. 1983) (requiring Texas medicaid to furnish the full scope of dental services required by the EPSDT portion of the Act.)

(2) The federal share of the cost of the medicaid program varies with each state, but the minimum federal contribution is 50%. The rate is based on a

formula taking into account the per capita income in each state. For example, the federal share for states such as Florida and Texas is in the area of 55-60%; for Arkansas and West Virginia, the federal contribution is approximately 75%.

II. The State's EPSDT obligation

Because the defendant Secretary of HRS has stated that he will make no contention that liver/intestine transplants are experimental, the medical necessity of the transplant services sought by Lexen Pittman is established. Under a 1989 amendment to the EPSDT portion to the Act, medicaid agencies have been given a clear mandate by Congress to provide coverage for all medically necessary care for medicaid recipients under the age of 21.

The EPSDT manage of comprehensive care has been recognized in the case law and interpretations of the 1989 amendment by the Federal Health Care FInancing Administration (HCFA). The first published decision on this point was McLaughlin v. Williams, supra, in which the Court said at p. 637, ftn. 3:

> The federal Medicaid statute does make "necessary" medical treatment a substantive provision considering the extent of coverage

> for infants such as Julian in the "early and periodic screening, diagnostic, and treatment ("EPSDT") portions of the statute. . .

Only 15 days after the decision in McLaughlin, the effect of the EPSDT amendment of 1989 was in issue because the Commonwealth of Virginia had denied heart transplant coverage for a 3-year-old girl. Judge Robert Merhige issued a temporary restraining order on April 17, 1992, and the parties agreed to an extension of the injunction until further order of the Court. On November 3, the Court granted plaintiff's motion for summary judgement. Pereira v. Kozlowski, 805 F.Supp. 361 (E.D. Va. 1992). The Court analyzed the same argument forwarded by Florida Medicaid in the instant case, and flatly rejected it:

> The language of 42 U.S.C. § 1396d(4) makes all medically necessary treatment which is permissible under the Medicaid Act, mandatory for participants under age 21 and explicitly does so regardless of whether such services are included in the State plan in question.
>
> * * *
>
> The question is simply one of statutory interpretation. In the Court's reading of the relevant language, § 1396b(i) prohibits payment for organ transplants unless a state plan includes specified transplant standards. The section does not make organ transplants ineligible for Medicaid coverage, it merely

> instructs the states that if they choose to provide this optional coverage, they must do so with certain limitations. Section 1396d(r), however, unambiguously removes the states' discretion to consider a medically necessary treatment option for a patient under age 21. If the treatment is permissible under the Medicaid Act, which transplants surely are, it must be made available to a participant under age 21 when medically necessary. . . (at p. 364; emphasis added.)

The Court's decision in Pereira has been appealed by Virginia medicaid; the state petitioned the Fourth Circuit for a stay of the district court's judgement pending appeal, but that motion was denied in a one-line order. Plaintiff's lawyers in the instant case believe that Virginia's appeal may ultimately be dismissed on the basis of mootness because Natalie Pereira has now received her heart transplant at the Medical College of Virginia and has made a successful recovery. The Court had noted in his opinion that "DMAS [Va. medicaid] has disclosed that MCV, through an exclusive agreement with DMAS, will do the procedure for the state free of charge." (please see Pereira, p.365). Moreover, a fair reading of Virginia's medicaid's motion for stay in the Court of Appeals is that the state would not look to the Pereira family for repayment, if the state were to win the appeal.

Since the case is not a class action, no actual or real controversy is left. The state of Virginia's main interest in seeking a stay was to try to insulate itself from providing transplant services which are not offered by the Medical College of Virginia. Bone marrow transplants and intestinal transplants for example, are not offered by MCV.

Florida medicaid apparently changes its position to suit its convenience in each case. In late September, 1992, when 39-year-old James Aldermen sued HRS seeking a heart transplant, the agency claimed it needed to spend the money for children. Attached as plaintiff's Exhibit 1 is a copy of the Court's unpublished opinion in Alderman. The following discussion by Judge Schlesinger is very revealing:

> . . . The Florida Legislature has only appropriated funds for heart transplants for people under twenty-one. According to Jan Temkin, Program Administrator for Medicaid in Florida, the Department's decision to fund only heart transplants for Medicaid recipients under twenty-one was based on the 1989 amendment to 42 U.S.C. § 1396d. . . The statute clearly requires a state participating in the Medicaid program to provide more services to Medicaid recipients under twenty-one than to other Medicaid recipients. See 42 U.S.C. § 1396(r).

(Alderman, at p. 4; emphasis added.)

So in addition to the Southern District of Florida and the Eastern District of Virginia, the U.S. District Court for the Middle District of Florida has found that the 1989 amendment to EPSDT creates a clear obligation for medicaid agencies.

The Court's decision in Miller v. Whitburn, 816 F. Supp. 505 (W.D. Wis. 1993), is an instance of judicial activism gone out of control. The Court's reasoning is made up out of whole cloth. In discussing the 1989 amendment to EPSDT, the Court said that Congress could not have intended to require all medically necessary care because the enactment was not attended by extensive legislative history (p. 510-11). Such a statement is a truly novel departure from the established law on statutory construction, which is stated by Justice Marshall in Burlington No. Railroad Co. v. Okla. Tax Commission, 107 S.Ct. 1855 (1987):

> The parties have canvassed at length the 15-year legislative history of the Act. . . we find the results of that investigation inconclusive and irrelevant. . . "when we find the terms of a statute ambiguous, judicial inquiry is complete." (at 481 U.S. 461, 95 L.Ed.2d 412).

The Court in Miller v. Whitburn, supra, aggravates its error by indicating that the Health Care Financing Administration (HCFA) has provided no guidance to the states regarding the 1989 amendment to EPSDT (p. 510). This conclusion by the Court is not true; although neither of Lexen Pittman's lawyers participated in Miller as an attorney of record, William Kimble is very familiar with the documentary evidence which was presented by the plaintiff in Miller. At least the following exhibits and other information were before that Court:

1. the Court's observation in McLaughlin, supra, at p. 643, ftn.12, that the state of West Virginia "believes it is compelled to pay for live-small bowel transplants pursuant to the EPSDT regulations. . . "

2. the policy of Oregon medicaid as communicated to medical providers. This memorandum, attached here as plaintiff's exhibit 2, states that OBRA 1989 requires that states provide all medically necessary care under EPSDT. The Oregon medicaid director further stated:

> as a result of these changes, OMAP will be covering none experimental

> medically necessary transplants for eligible children under age 21,

3. the policy of Texas medicaid as evidenced in a letter from medicaid's contractor (National Heritage Insurance Company) to the University of Pittsburgh Medical Center. In this prior authorization letter, which is attached as plaintiff's exhibit 3, Texas medicaid denied coverage under "the regular insured portion of Texas medicaid", but added:

> However, your request has been approved through. . . (EPSDT) . . . for children under 21 years of age in need of any health care service that is medically necessary and appropriate and is a federally allowable Medicaid benefit, regardless of the limitations of the Texas Medicaid program.
> (emphasis added.)

These strong statements of policy from the medicaid agencies of West Virginia, Oregon, and Texas, are not the result of some radical social planning, but are the result of the considered judgments of hard-nosed medicaid administrators influenced by HCFA, that the game is up; Congress has spoken in a clear voice that in the medical care of children there will be no compromise. In this subject area, the state have no discretion.

Medicaid administrators do not make policy changes such as those of Texas, Oregon, and West Virginia without close consultation with the HCFA regional office. HCFA's fingerprints are all over the state policy pronouncements discussed above. Surely it is disingenuous for the Court in Miller to have ignored this fact of life.

In addition to the evidence which was presented to the Court in Wisconsin, two other documents are very important. Attached as plaintiffs exhibit 4 is the affidavit of Carl Silvernail, a medicaid program specialist with a HCFA regional office. The entire affidavit has been attached for purposes of completeness, but only paragraph 6 is germane:

> Neither section 1903 nor HCFA policies, dictate or require any state to provide coverage for any particular kind of transplant or class of recipient. An exception to this principal is that a state must cover any medically necessary procedures for those individuals under the age of 21, 42 U.S.C. §1396d(r).

Finally, attached as plaintiff's exhibit 5 is a policy interpretation by HCFA which was discovered by plaintiff only 10 days ago. It is a memorandum from the national director of HCFA Medicaid Bureau to all

regional administrators. The memorandum says that because of the OBRA 1989 amendment, states will have to provide medically necessary organ transplants to children. The medicaid bureau director further states:

> . . .§ 1905 (r)(5) of the Social Security Act is clear that all services or treatments which are "medically necessary" to correct or lessen health problems detected or suspected by the screening services must be provided to individuals under age 21. Therefore, states must indicate in the plan that any limits on services or treatments are not applicable to EPSDT recipients.
>
> (emphasis added.)

III. Preliminary Injunction

Because of the likelihood of success on the merits and the immediate harm Plaintiff will suffer, he seeks the protection of this Court for preliminary relief. The standards for preliminary relief have been set forth in Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974). See also: Cate v. Oldham, 707 F.2d 1176, 1185 (11th Cir. 1983); and Mississippi Power and Light Co. v. United Gas Pipe Line, 609 F. Supp. 333 (D.C. Miss. 1984). The four prerequisites are as follows: (1) a substantial likelihood that Plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer

irreparable injury if the injunction is not granted, (3) that the threatened injury to Plaintiff outweighs the threatened harm the injunction may do to the defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

(1) THERE IS SUBSTANTIAL LIKELIHOOD THAT PLAINTIFF WILL PREVAIL ON THE MERITS OF HIS CLAIM.

The above arguments clearly support the substantial likelihood of success on the merits of this claim. Accordingly, the standards for the issurance of a preliminary injunction can be appropriately applied to this case.

The Court in Canal Authority adopts a type of sliding scale approach in which each requirement is considered in relation to the other criteria. The Court discusses how the importance of the requirement concerning substantial likelihood of success varies with the relative balance of threatened hardships facing each of the parties. The Court quotes from Wright and Miller, Fed. Prac. and Proc.: Civil § 2948 in stating:

> [a]lthough a showing that plaintiff will be more severely prejudiced by a denial of the

> injunction than defendant would be by its grant does not remove the probability of winning on the merits, it does lower the standard that must be met.
>
> Canal v. Authority, at 576

The Court describes the purpose of a preliminary injunction as preventing irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It finds ". . . the most compelling reasoning in favor of granting a preliminary injunction is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act." Indeed, that reasoning is directly appliable to the case at hand. Defendant's refusal to provide the necessary medical treatment to plaintiff could result in his death, thereby rendering a full judicial consideration of the merits of this case meaningless.

The standards as articulated in Canal Authority wherein the imbalance of hardship in plaintiff's favor lessens the emphasis on the remaining criteria have been applied to a medicaid liver transplant case. In Todd v. Sorrell, 841 F.2d 87, 88 (4th Cir. 1988) the Court relied on language expressed in Blackwelder Furn. Co. v. Seiling Mfg. Co., Inc., 550 F.2d 189 (4th Cir. 1977) that

"[i]t will ordinarily be enough that plaintiff has raised questions going to the merits, so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.

The Court was satisfied that there was a probable right and a probable danger, and the right may have been defeated unless the injunction issued. The reasoning of Todd wherein considerable weight was given to the need of protection to the plaintiff as contrasted to the probable injury to the defendant should be applied to the case at hand.

(2) THE PLAINTIFF WILL SUFFER IRREPARABLE INJURY UNLESS THE INJUNCTION ISSUES.

The report of Mario Tano, M.D. of a consultation performed on May 31, 1993 which is attached as exhibit 6 states that plaintiff will die without the liver/intestine transplant. The search for a donor cannot commence unless the state is compelled to provide the financial guaranty required by the hospital. It should be noted that this Court in McLaughlin found affidavits and other hearsay materials appropriate evidence given the

character and objectives of the injunctive proceeding, McLaughlin at 642, ftn. 10.

(3) THE THREATENED INJURY TO PLAINTIFF OUTWEIGHS THE THREATENED HARM THE INJUNCTION MAY DO TO DEFENDANT.

Concerning the balancing of equities as to the harm each party will suffer the Court found in Todd and McLaughlin that the harm to plaintiffs in those cases would have been enormous, indeed fatal, were the injunctions denied, and the harm to the state if granted, while it may not have been negligible, was measured only in money and was inconsequential by comparison. such reasoning similarly applies to the present case.

(4) THE GRANTING OF THE PRELIMINARY INJUNCTION WILL NOT DISSERVE THE PUBLIC INTEREST.

The Courts have often found in medicaid cases concerning indigent plaintiffs that the public interest is served by the avoidance of necessary pain by the individuals concerned, and by final adjudication of the propriety of certain state regulations. The public interest as expressed in the federal statutes involved also has

supported the issuance of preliminary injunctions. Burns v. Vowell, 424 F.Supp. 1135, 1142 (S.D. Tex. 1976).

The Court found in McLaughlin that the public interest was served by compelling the state to take the steps necessary to ensure that the search for the required organ could commence. The Court's conclusion is as applicable today in the case at hand as it was a year ago. In the words of Judge Marcus: "[s]urely, given the strong possibility that the state has erred in refusing payment, it is in the public interest to ensure that full resolution on the merits is possible, and that plaintiff's claim is not rendered moot by his death."

Respectfully submitted,

/s/MARY ANNE ROBERTSON
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to Karel Baarslag, Esq., Florida Department of HRS, Office of General Counsel, 1317 Winewood Blvd., Bldg. 6, Room 432, Tallahassee, FL 32399, this 9th day of June 1993.

/s/ MARY ANNE ROBERTSON
MARY ANNE ROBERTSON

Lexen7

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES ALDERMAN,

Plaintiff

vs.

Case No. 92-1388-Civ-T-99C

ROBERT B. WILLIAMS,

Defendant.
_____/

ORDER

This cause is before the Court on the Plaintiff's Motion for Preliminary Injunction, filed September 24, 1992 (Doc. No. 1). The Court held a hearing on the motion on September 29, 1992 after granting the Plaintiff's Motion For Temporary Restraining Order on September 25, 1992. Both parties were represented and had an opportunity to present argument and evidence to the Court at the hearing held September 29, 1992.

The underlying facts in this matter have not changed since the Court granted the Motion for Temporary Restraining Order on September 25, 1992. The Plaintiff is a thirty-nine year old Medicaid recipient apparently in desperate need of a heart transplant. He

seeks a preliminary injunction requiring the Defendant to provide immediate funding from Medicaid for comprehensive transplant services in the form of a written financial guarantee from the Defendant. The guarantee will enable the Plaintiff to be placed on the active heart transplant list. The Defendant has a written policy that it does not provide funding for heart transplants for Medicaid recipients over the age of twenty-one. See Fla. Admin. Code § 10C-7.039 (1992). The Court granted the Plaintiff's Motion for Temporary Restraining Order because it had not been presented any rationale for the Defendant's policy, except for funding reasons, and it therefore appeared to the Court at the time that the Defendant's policy was arbitrary.

A party seeking injunctive relief bears the burden of establishing four criteria: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury in the absence of injunctive relief; (3) a balance of hardships favoring the movant; and (4) the advancement of some discernible public interest by entering injunctive relief. Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974).

Once a state elects to participate in the Medicaid program, it must comply with federal requirements. See 42 U.S.C. § 139[illegible] Dexter v. Kirschner, 1992 WL 196405 (9th Cir. Aug. 18, 1992). A state is required to provide five general categories of medical treatment: (1) inpatient hospital services; (2) outpatient hospital services; (3) laboratory and x-ray services; (4) skilled nursing services; and (5) physician services. 42 U.S.C. §§ 1396a(10), 1396d(a). Furthermore, a state "may not arbitrarily deny or reduce the amount, duration, or scope of a required service. . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c).

A specific requirement of 42 U.S.C. §§ 1396a(10) and 1396d(a)(4)(B) is that a state provide "early and periodic screening, diagnostic, and treatment ["EPSDT"] services as defined in subsection (r) of this section) for individuals who are eligible under the plan and are under the age of 21." 42 U.S.C. § 1396d(a)(4)(B). Subsection (r) was added to Section 1396d in 1989 and provides in relevant part that mandated EPSDT services include:

> [s]uch other necessary health care, diagnostic services, treatment, and other measures

> described in subsection (a) of this section to correct and ameliorate defects and physical illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

42 U.S.C. § 1396d(r)(5).

As the Court noted in its September 25, 1992 Order, states do have some discretion in determining which medical services to cover under their Medicaid program. Dexter, 1992 WL at 196405; Meusberger v. Palmer, 900 F.2d 1280, 1282 (8th Cir. 1990). State Medicaid plans need not fund organ transplants, 42 U.S.C. §1396b(i), even when they are medically necessary. Meusberger, 900 F.2d at 1282; Ellis v. Patterson, 859 F.2d 52 (8th Cir. 1988). Moreover, states may elect which, if any, organ transplants to cover. Id. However, once a state has adopted a policy to cover a category of organ transplants, it may not arbitrarily or unreasonably deny services to an otherwise eligible Medicaid recipient. Id.

The main issue before the Court at this time is whether the Plaintiff has a substantial likelihood of success on the merits of his claim that the state must fund a heart transplant for him. At the hearing held September

29, 1992, the Defendant presented evidence that it formulated a policy on heart transplants for fiscal reasons: there is simply not enough money available to fund all heart transplants for eligible Medicaid recipients. The Florida Legislature has only appropriated funds for heart transplants for people under twenty-one. According to Jan Temkin, Program Administrator for Medicaid in Florida, the Defendant's decision to fund only heart transplants for Medicaid recipients under twenty-one was based on the 1989 amendment to 42 U.S.C. § 1396d quoted above. The statute clearly requires a state participating in the Medicaid program to provide more services to Medicaid recipients under twenty-one than to other Medicaid recipients. See 42 U.S.C. §1396d(r). 42 C.F.R. § 441.57 echoes the Medicaid statute's distinction between recipients under twenty-one and recipients over twenty-one. It provides:

> Under the EPSDT program, the [state] may provide for any other medical or remedial care specified in Part 440 of this subchapter, even if the [state] does not otherwise provide for these services to other recipients or provides for them in a lesser amount, duration, or scope.

42 C.F.R. § 441.57.

In light of Congress' determination that Medicaid recipients under twenty one should receive more services than other Medicaid recipients, the Court is unable to conclude that Florida's decision to allocate the limited public funds available for heart transplants to those Medicaid recipients under twenty-one is arbitrary or unreasonable and hence violative of the Medicaid statutory scheme. The Plaintiff argues that Rush v. Parham, 625 F.2d 1150 (5th Cir. 1980) requires Florida to fund all non-experimental medically necessary procedures, including organ transplants. However, Rush is inapposite. In Rush, an organ transplant was not the procedure in question and there was not a specific provision in the Medicaid statute, as there is in this case with respect to organ transplants, that allowed the state to choose whether to cover the procedure at issue.

The Plaintiff's equal protection argument also must fail. 42 U.S.C. § 1396b(i) precludes payment for organ transplants unless made pursuant to written state standards ensuring that "similarly situated individuals are treated alike." 42 U.S. §1396b(i). The intent of this provision was "to assure that State coverage decisions for organ transplants are based on clear principles

consistently applied, and not on political or media considerations." Ellis, 859 F.2d at 55. See also Meusberger, 900 F.2d at 1283 ("purpose of provision is to provide objective criteria, subject to challenge as being arbitrary or unreasonable"). Although Salgade v. Kirschner, 1992 WL 5926 (Ariz.App.) is not a binding case on this Court, the Court agrees with the observation that age is a clear principle that can be consistently applied. Gregory v. Ashcroft, 111 S.Ct. 2395, 2407 (1991). Moreover, the Court notes that age classifications are not per se invalid, see e.g. Jefferson v. Hackney, 406 U.S. 535 (1972), and youth is not an unreasonable or arbitrary factor in spending limited public funds. See Kantrowitz v. Weinberger, 388 F.Supp. 1127 (D.D.C. 1974), aff'd 530 F.2d 1034 (D.C.Cir. 1976). Since a rational basis exists for the differentiation between Medicaid recipients in this case, there is no equal protection violation. Gregory, 111 S.Ct. at 2406; McGowan v. Maryland, 366 U.S. 420 (1961).

The Plaintiff also contends that the Defendant's refusal to provide funding for a heart transplant violates the recently enacted Americans With Disabilities Act, 42

U.S.C. 12101, et seq. The relevant portion of the Act, 42 U.S.C. § 12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

A "qualified individual with a disability" is defined as:

> an individual with a disability who, with or without reasonable modifications to rules, policies or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

The Court believes that the Americans With Disabilities Act does not offer the Plaintiff relief because the decision to not fund his heart transplant was indisputably based on his age, not the fact that he is disabled. As discussed above, it is reasonable for Florida to use Medicaid recipients' age as the objective criteria in allocating public funds for heart transplants.

In its Order granting a temporary restraining order, the Court observed that it had not at that time been presented a rationale for the state's policy and that the policy therefore appeared arbitrary. The Court has now been presented the state's rationale and, for the reasons discussed above, believes that it is not in fact arbitrary or unreasonable in light of existing law. Therefore, the Court's September 25, 1992 Order must be dissolved.

The Court doubts that there is a person in the country who would not want to order the state to fund a heart transplant for the Plaintiff. It is fundamental, though, that the "Constitution does not empower a federal court to second-guess state officials charged with the difficult task of allocating limited public welfare funds." Dexter, 1992 WL 196405; See also Dandridge v. Williams, 397 U.S. 471 487 (1970). Unless the state officials have violated the law, or the law is changed, the Court cannot require them to fund a heart transplant.

In sum, the Plaintiff does not have a substantial likelihood of success on the merits of his claim that the state must fund a heart transplant for him and preliminary injunctive relief is therefore not appropriate. Because this case involves the Plaintiff's life, this Order will not take

immediate effect in order to allow the Plaintiff the opportunity to attempt an appeal of this Order, if he so desires.

Based on the foregoing, it is ORDERED AND ADJUDGED that:

1. The Plaintiff's Motion for Preliminary Injunction, filed September 24, 1992 (Doc. No.1), is **DENIED**.

2. The effect of this Order is **STAYED** until 5:00 P.M., Friday, October 2, 1992 in order to allow the Plaintiff to file an appeal with the United States Court of Appeals for the Eleventh Circuit and to request further emergency relief from the Court of Appeals. The terms of the temporary restraining order entered September 25, 1992 shall remain in effect until that time.

DONE AND ORDERED at Jacksonville, Florida this 1st day of October, 1992 at 1:54 P.M.

/s/ HARVEY E. SCHLESINGER
HARVEY E. SCHLESINGER
United States District Judge

Copies to:

William Kimble, Esq.
Clyde Collins, Esq.
Gordon Scott, Esq.

NOTE: The parties were telephonically notified of the contents of this Order/

DEPARTMENT OF HUMAN RESOURCES

OFFICE OF MEDICAL ASSISTANCE PROGRAMS
PUBLIC SERVICE BUILDING
SALEM, OREGON 97310-0380PHONE 378-2263
TOLL FREE MESSAGE LINE 1-800-527-5772
(date will be inserted by the computer)

TO: Medical Providers

FROM: Jean Thorne, Director
Office of Medical Assistance Programs, DHR

SUBJECT: Impact of the Omnibus Budget Reconciliation Act of 1989 (OBRA)

The Omnibus Budget Reconciliation Act of 1989 (OBRA) requires that States provide children, under age 21, with any medical services covered under Federal guidelines shown to be medically necessary as a result of An Early and Periodic Screening Diagnosis and Treatment (EPSDT) screening evaluation.

As a result of these changes, OMAP will be covering non-experimental medically necessary transplants for eligible children under age 21. All transplant services will reuire prior authorization from OMAP. The Office of Medical Assistance Programs created a new guide, Transplant Services, which contains the administrative rules governing transplant services. To obtain a copy of the Transplant Services Guide contact:

Office of Medical Assistance Programs
Provider Enrollment
212 Public Service Building
Salem, Oregon 97310

Administrative rules for the Transplant Guide have been filed as Temporary Rules with the Secretary of State's Office. Before the Permanent Rules are filed, a Public

Hearing regarding these rules will be held on May 17, 1990, 9:00 a.m. in Room 257, State Capitol Building, Salem. If you would like to comment on these rules but are unable ~~to attend~~ the Hearing, written testimony will be accepted through May 15, 1990. Send testimony to Deveta Leedy, Rules Specialist, Office of Medical Assistance Programs, 203 Public Service Building, Salem, Oregon 97310.

STANDARDS FOR ORGAN TRANSPLANTATION

Coverage for transplants and transplant-related services is available through EPSDT for Title XIX eligible individuals under the age of 21. Kidney and cornea transplants are covered for Title XIX eligible individuals over the age of 21. Written standards are established for the provision of organ transplants; they treat similarly situated individuals alike. Prior authorization of payment is required through OMAP. Payment is made only for services provided during the time the individual is Title XIX eligible.

Transplant services will be reimbursed only when provided in a transplant center that provides quality services.

(a) If the services are available in the State of Oregon reimbursement will not be made to out-of-state transplant centers. Out-of-state centers will be considered only if the type of transplant is not available in the State of Oregon.

(b) Services provided by out-of-state transplant centers will be reinbursed through an agreement between the Office of Medical Assistance Programs and the transplant center. Out-of-state transplant centers will be selected in consultation with the requesting physician and must be consistent with Office of Medical Assistance Programs requirements for quality services and cost effectiveness.

Covered transplants are limited to heart, heart-lung, allogeneic bone marrow, autologous bone marrow, harvesting of autologous bone marrow, liver, liver-kidney, pancreas-kidney, kidney, and cornea transplants. Patient selection criteria are described below:

Criteria and Contraindications for Heart and Heart-Lung Transplants

1. The client must have a maximum probability of successful clinical outcome.

2. The client must have one of the following diagnoses:

   (a) Heart failure, NYHA Class IV, or, rapidly progressive (over months) HYHA Class III.

   (b) Progressive but reversible pulmonary hypertension due to an otherwise inoperable intracardiac defect.

3. A client considered for a heart-lung transplant must have heart failure as defined in (a) above and pulmonary hypertension.

4. The client must have a poor caridac functional status or cardiac/pulmonary functional status.

5. All alternative treatments that have a one year survival rate comparable to that of Heart or Heart-Lung transplantation must have been tried or considered.

Approved: 12/13/90Effective: 4/1/90

HEALTH CARE ADMINISTRATION

OMB NO. 0938-0191

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL FOR HEALTH CARE FINANCING ADMINISTRATION	TRANSMITTAL NUMBER #90-14 / STATE OREGON PROGRAM IDENTIFICATION Title XIX - Medical Assistance
REGIONAL ADMINISTRATOR HEALTH CARE FINANCING ADMINISTRATION DEPARTMENT OF HEALTH AND HUMAN SERVICES	PROPOSED EFFECTIVE DATE April 1, 1990

TYPE OF PLAN MATERIAL (Check One)

☐ NEW STATE PLAN ☐ AMENDMENT TO BE CONSIDERED AS NEW PLAN ☑ AMENDMENT

COMPLETE NEXT 4 BLOCKS IF THIS IS AN AMENDMENT (Separate transmittal for each amendment)

FEDERAL REGULATION CITATION Public Law 101-239

NUMBER OF THE PLAN SECTION OR ATTACHMENT Attachment 3.1-A, page 1.a Attachment 3.1-B, page 2.a Attachment 3.1-E, pages 1 through 8	NUMER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT Attachment 3.1-A, page 1.a Attachment 3.1-B, page 2.a Attachment 3.1-E, pages 1 and 2

SUBJECT OF AMENDMENT This transmittal removes the hospital day limit for children under age 21 and also includes transplant criteria since transplants are being covered under EPSDT.
Fiscal Impact: increased expenditures in the amount of $3,117,674 TF ($1,962,403 FF; $1,155,271 GF) from April 1, 1990 through 6/30/1991.

GOVERNOR'S REVIEW (Check One)

☐ GOVERNOR'S OFFICE REPORTED NO COMMENT
☐ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED
☐ NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL
☑ OTHER, AS SPECIFIED : Per Attachment 7.3A

SIGNATURE OF STATE AGENCY OFFICIAL	FOR REGIONAL OFFICE USE ONLY DATE RECEIVED 7/02/90 / DATE APPROVED 10/01/90
STAMPED NAME Kevin W. Concannon Director	PLAN APPROVED - ONE COPY ATTACHED
TITLE Department of Human Resources Jean I. Thorne Director, Office of Medical Assistance Programs, DHR	EFFECTIVE DATE OF APPROVED MATERIAL Apr 1
DATE June 28, 1990	SIGNATURE OF REGIONAL OFFICIAL /s/ Albert J. Benz
	TYPED NAME Albert J. Benz
RETURN TO Office of Medical Assistance Programs Department of Human Resources 203 Public Service Building Salem, OR 97310 Postmarked 6/28/90 Salem, OR	TITLE Associate Regional Administrator
	REMARKS

HCFA-170 (V90) (Formerly PCO-111)

Submit 6 Copies

NHIC
National Heritage Insurance Company
11044 Research Boulevard, Bldg. C
Austin, Texas 78759-5239
(612) 343-4900

An EDS Company

December 29, 1992

Andreas Tzakis, M.D.
University of Pittsburgh Medical Center
University Surgical Associates, Inc.
3601 Fifth Avenue
Pittsburgh, Pennsylvania 15213

ATTN: Kathy Altieri, R.N., B.S.N., C.C.T.C.
Pediatric Transplant Coordinator

In Re: EPSDT-CCP
Rodolfo Baca
Medicaid No.: 510192986

Dear Dr. Tzakis:

Your request for combined liver/small intestine transplant procedure for the diagnosis of short bowel syndrome secondary to volvulus of unknown etiology and cholestasis secondary to hyperalimentation dependency must be denied through the regular insured portion of Texas Medicaid, as procedures or services that are considered experimental or investigational.

However, your request has been approved through the Early and Periodic Screening, Diagnosis and Treatment (PSDT) Comprehensive Care Program (CCP) for children under 12 years of age in need of any health care service that is medically necessary and appropriate and is a federally allowable Medicaid benefit, regardless of the limitations of the Texas Medicaid program. This letter is your authorization to provide out-of-state services to Rodolfo Baca, specifically, combined liver/small intestine transplant procedure to be performed at the-University of

Pittsburgh Medical Center/University and Surgical Associates, Inc. Please attach a copy of this letter and an operative report to the claim when you file for these services.

NOTE: Benefits ar only payable if the client is eligible for Medicaid at the time of the services (s), and the provider of the services is actively enrolled in the Medicaid program.

The prior authorization number (PAN) is #2366466001.

This prior authorization is effective from December 29, 1992 through December 28, 1993.

The institution will be reimbursed according to a prospective Texas Medicaid payment methodology based upon diagnosis related groups (DRG), providing there is any 30-day inpatient hospital spell of illness remaining.

Since Rodolfo Baca is a Spenddown client, his eligibility coverage will always be retroactive. Therefore, in order for this prior authorization to be effective, Rodolfo must meet his Spenddown amount for the month in which his transplant occurs. If this amount is not met for the month in which his transplant occurs, then Texas Medicaid cannot reimburse for these services.

Please enter this prior authorization number in the appropriate block number (#23B) of the claim form. Out-of-state services for combined liver/small intestine transplant procedure are paid according to Medicaid reimbursement guidelines and are payable if the client is eligible for Medicaid at the time of service. Please submit your claim form to the following address:

National Heritage Insurance Company
P. O. Box 202976
Austin, Texas 78720-2976

If you have any questions, please call our customer service representative at 1-800-846-7470.

Yours truly,

/s/ Richard L. Taylor, M.D.
Richard L. Taylor, M.D.
Deputy Medical Director

RLT:slr

cc: Plonnie Taylor, EPSDT-CCP Department
Genie DeKneef, TDHS
Alfonso Chavez, M.D., Nephrology Associates of El Paso, Curie Medical Building, 1733 Curie Drive, Suite 302, El Paso, Texas 70092
Diane Fedor, Children's Hospital of Pittsburgh, One Children's Place, 3705 Fifth Avenue, Pittsburgh, Pennsylvania 15213

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
OKLAHOMA CITY DIVISION

WILLADEAN PAYNE,

Plaintiff,

v. Civil No. 91-1888-R

PHILLIP WATSON, WINSTON BARTON, and CHARLES BRODT, officials of the Oklahoma Department of Human Services

Defendant

AFFIDAVIT OF CARL A. SILVERNAIL

State of Texas)
County of Dallas)

Carl A. Silvernail, being duly sworn, hereby deposes and states as follows:

1. I am a Medicaid Program Specialist with the Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services in Region VI, Dallas, a position I have held for approximately ten (10) years. As such I am the main contact point between the State of Oklahoma Medicaid program and the HCFA regional office.

2. My duties in that position include, but are not limited to, review and coordination of decisions regarding the Medicaid State Plan, and any amendments; and provision of technical assistance on Medicaid program policies and procedures.

3. I am completely familiar with the procedures by which a state develops a Medicaid Plan, and after approval by HCFA, implements it.

4. I am also completely familiar with the administrative and programmatic relationships between the State of Oklahoma Medicaid program and the federal government, as described in the Medicaid provisions of the Social Security Act, 42 U.S.C. §1396 (and following), and regulations, 42 C.F.R. Part 430, as well as the interaction between the state and federal government with respect to organ transplants, under the statute, 42 U.S.C. §1396b(i)(1).

5. Under Section 1903i, 42 U.S.C. §1396b(i)(1), which permits a state to elect by a provision in its state plan to cover or not cover organ transplants, and permits a state to limit the group of similarly situated individuals for whom the state would cover such services, the State of Oklahoma, amended its state plan to cover liver

transplants for eligible individuals who are 18 years old and under. The Oklahoma plan was approved by HCFA, under authority of 42 C.F.R. Park 430, and became effective on October 1, 1987. A copy of the relevant page of the Oklahoma plan is attached.

6. Neither section 1903i, nor HCFA policies, dictate or require any state to provide coverage for any particular kind of transplant or class of recipient. An exception to this principal is that a state must cover any medically necessary procedures for those individuals under the age of 21. 42 U.S.C. §1396d(r).

7. In order for a state to receive federal financial participation (FFP) payment for Title XIX (Medicaid) services, the state must present a claim to the federal government. This is done by submitting to HCFA an expenditure report of payments made by the state for specific Medicaid services. HCFA reviews the expenditure report to ascertain that payment was made by the state for only those services covered by the state plan. If HCFA determines that payment has been made by the state for a service not covered by the state plan, HCFA must disallow payment. If HCFA disallows payment, the state has a full array of appeal rights, including hearing

before the Departmental Appeals Board, and subsequent judicial review. 42 C.F.R. Park 430.

8. Regarding the potential liability of the State of Oklahoma for the payment of medical costs for a liver transplant for the plaintiff in this case, no claim has been made by the State of Oklahoma for FFP, and therefore, no disallowance or other "final decision" by HCFA has been made.

9. On or about November 13, 1991, Mr. Charles Brodt, Division Administrator for Medical Services, first initiated a telephone call and then submitted a letter to HCFA, specifically to Don Hearn, Chief, Medicaid Program Operations Branch, requesting technical assistance on the issue of payment for a liver transplant for an individual not covered under the Oklahoma State plan. After his conversation with Mr. Brodt, and upon receipt of the letter, Mr. Hearn asked me to draft a response for the Regional HCFA Administration because I am the specialist in the branch with the responsibility to provide such technical assistance to Oklahoma.

10. The response I drafted was in the nature of an explanation of the limitations imposed by the statute on FFP payment for a service to an individual not covered by

the Oklahoma state plan and was purely advisory, because the nature of the request warranted an advisory opinion, and because the State had not submitted a claim for payment.

11. As in any case where a state makes payment or services not covered, HCFA will determine whether FFP is allowed based on the requirements of the statute and regulations, after a specific claim for FFP has been made.

/s/ Carl A. Silvernail
Carl A. Silvernail

Subscribed and sworn to before me this 5th day of December, 1991.

/s/ Eva Williams
Eva Williams, Notary Public
Dallas County, Texas

My Commission Expires: 4/14/95

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care
Financial Administration

MEMORANDUM

Refer to: FME-42

From: Director
Medicaid Bureau

Subject: Revisions to the State Plan Preprint Due to OBRA 89 EPSDT Provisions

To: All Regional Administrators

During the recent MCH TAG meeting, a discussion was held regarding what sections of the Medicaid State Plan needed to be revised in order to comply with the provisions of the Omnibus Budget Reconciliation Act of 1989 (OBRA 89) and the EPSDT program. We are currently drafting State Plan preprint pages, however, it will be several months before these pages are published. In the meantime, we have the following suggestions for the States.

Item 4.b. of Attachments 3.1-A and 3.1-B, should be revised to indicate that the State meets the new requirement in section 1905(r) of the Act that all medically necessary diagnosis and treatment services will be furnished to EPSDT recipients to treat conditions detected by periodic and interperiodic screening services, even if the services are not included in the State Plan. The State should list each 1905(a) service which is not currently provided under the State Plan but must now be available to EPSDT recipients if medically necessary.

In addition, because States will now have to provide any medically necessary organ transplants to children under age 21, States should amend their plans to comply with the requirements of section 1903(i) of the Social Security Act. Therefore, pages 27 and Attachment 3.1-B should

be revised with the appropriate organ transplant information. Organ transplants should also be added to the list of services provided to EPSDT recipients in Item 4.b of Attachments 3.1-A and 3.1-B.

The States must also make revisions to the reimbursement section of their Plans. Specifically, Attachment 4.19-B should be revised to include reimbursement methodologies and assurances for the additional Title XIX services not otherwise covered under the State plan, which are require to be provided to EPSDT recipients if medically necessary. It is unacceptable to merely indicate that payment for these services will be based on existing Medicare and Medicaid reimbursement methodologies. The State must identify the particular service by name and indicate the specific reimbursement methodology to be used. If the State chooses to use a reimbursement methodology that is employed for some other service, specific identification of the service and location in the Plan of its reimbursement methodology must be provided. If the State chooses to follow Medicare payment methodologies, the specific service and the specific Medicare payment methodology to be utilized must also be provided.

Regulations at 42 CFR 447.201(b) require that the State plan describe the policy and methods to be used in setting payment rates for each type of service included in the State's Medicaid plan. The State should provide a full discussion of its charge structure and how it is related to payment for the services. For payment/reimbursement purposes, the State will need to ascertain the type of services, site of services, and type of providers. The State also needs to provide assurances that if there are providers involved whose payment is based on reasonable cost, the State provides appropriate cost reimbursement methodology.

Finally, the States should be advised to evaluate the amount, duration and scope of services currently provided in its approved plan. For example, a State may have a limit on the number of inpatient hospital days or a fixed

cap on the amount of services. States may not place arbitrary limits on services furnished to EPSDT recipients. Section 1905(r)(5) of the Social Security Act is clear that all services of treatments which are "medically necessary" to correct or lessen health problems detected or suspected by the screening services must be provided to individuals under age 21. Therefore, States should indicate in the plan that any limits on services or treatments are not applicable to EPSDT recipients.

If you have any questions regarding the coverage information in this letter, please contact Cindy Ruff of my staff on FTS 646-1292. If you have any questions regarding reimbursement issues, please contact Chris Howe on FTS 646-3276 or Marge Sciulli on FTS 646-0691.

Christine Nye

Rm:254-01

PITTMAN, LEXEN MARIO TANO, M.D.
MR# 630005

Date of Consultation: 05/31/93
Attending Physician: ROBERT F. HUNT, D.O.

HISTORY OF PRESENT ILLNESS: Lexen is a well-known infant to me. The child has liver failure and short-bowel syndrome and was a premature infant here at the Neonatal ICU at Broward General. Also, the child is in liver failure and recently was rejected by the State for liver and small bowel transplant. The mother, however, is pursing this and has notified Pittsburgh for help.

The child is readmitted for line sepsis and gastrointestinal bleeding. Chronically, the child has elevated liver enzymes, elevated PT and PTT, as well as elevated bilirubin. Also chronically the child does have short-bowel syndrome and is on total parenteral nutrition. He has TPN cholestasis, which is a known complication. The child has a central line and has had recurrent episodes of infections. His last bilirubin was 24.2, which decreased to 23, his SGOT 263, now 279. His SGPT initially was 380, now 97. Pt was 14.5, PTT 29.1. His triglycerides were elevated at 442, down to 279, and this was decreased on hyperalimentation. Initially he had gastrointestinal bleeding and this has resolved. He is on only clear fluids p.o., he does not take any formula orally.

PHYSICAL EXAMINATION:

VITAL SIGNS: Stable. He is on room air. Weight is not available at this time.

GENERAL: He is an alert baby, significantly jaundiced.

HEENT: Sclera is quite icteric, his facies also edematous.

NECK: Supple, with free range of motion.

CHEST: Symmetrical. There is a central line placed.

HEART: Regular rate and rhythm. No gallops, no murmurs.

LUNGS: Clear.

ABDOMEN: Protuberant. There are several surgical scars. His liver is quite enlarged, although it is quite difficult to ascertain the exact size. Spleen is also enlarged. The abdomen also is free of masses. The bowel sounds are decreased.

EXTREMITIES: Symmetrical.

NEUROLOGICAL: The child has no gross motor or sensory deficits.

IMPRESSION: Unfortunate infant with cholestasis, liver failure, hyperbilirubinemia, elevated liver enzymes and elevated triglycerides, all of which are functions of the liver. He must also have fatty metamorphosis and fatty infiltrations which are related to TPN and cholestasis as well as liver failure.

I have explained to the mother that he certainly is at risk for all the complications from liver failure including but not limited to gastrointestinal bleeding, and certainly the only chance of survival for this child is a liver and small-bowel transplant. However, we will continue to support the child with hyperalimentation, fresh frozen plasma as needed, as well as vitamins, A, D, E and K, which are the fat-soluable vitamins. The mother is well aware of the child's

status. Also, the child will be treated for his CVL sepsis during this hospitalization. I will follow this child for his GI problems, although Dr. Hunt is the primary care physician and coordinates most of his medical problems.

Other suggestions are that the child have lipids reduced on the hyperalimentation to one or two times per day, since his dietary needs will be that at least 20% of his calories are from lipids. To a certain degree, his inability to digest fats is from the lack of liver function, however his dietary needs are still present. I do not feel that the child can be completely off of dietary intake of lipids. I will address this with Dr. Hunt.

MARIO TANO, M.D.

MT:ky 7402
d: 06/01/93
t: 06/01/93 2:22 P

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

LEXEN PITTMAN,

Plaintiff,

by his next friend,
Ramona Pope

CASE NO. 93-6461

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES

Defendant

_____/

SUPPLEMENT TO
DEFENDANT'S MEMORANDUM OF LAW
IN OPPOSITION TO THE GRANTING
OF A PRELIMINARY INJUNCTION

Plaintiff's claims are brought under 42 U.S.C. §1983. (See Plaintiff's Original Complaint Paragraph 3). In Maine v. Thiboutot, 448 U.S. 1 (1980), the Court held that §1983 provides a remedy for violations of federal statutes as well as the Constitution. However, violation of a federal statute is not by itself sufficient to support a §1983 action which speaks in terms of rights, privileges or immunities and not merely violations of federal law. Clifton v. Schafer, 969 F.2d 278, 283 (7th Cir. 1992).

No §1983 cause of action is available where Congress has foreclosed enforcement of the statute in the enactment itself. Wilder v. Virginia Hospital Assn., 496 U.S. 498, 508 (1990). Moreover, no cause of action will lie for violation of a federal statute if the statute does not create enforceable rights, privileges or immunities within the meaning of §1983. Suter v. Artist M., _____, 112 S.Ct. 1360 (1992).

Since the creation of the Medicaid program in 1965, federal courts have protected the rights of applicants and recipients in the appropriate case and to the extent that those rights are protected by federal law or by the Constitution. With certain exceptions, the discussion of prior cases defining the court's scope of inquiry is not particularly helpful.

Plaintiff here seeks relief through resort to judicial intervention in policy decisions made by the department. The Legislature has vested the department with adequate discretion to determine the parameters of the medical assistance program in Florida. If the Legislature wishes to pay for these or any other specific services, it may so provide. That is not a matter, however, in which this

court should become involved unless a state has violated federal law by not providing the service in question.

The Court in Suter, supra, held that 42 U.S.C. §671(a)(15) did not create a right enforceable under §1983 because it required only that a state have a plan providing that the state would make "reasonable efforts" to prevent removing a child from his or her home or to make it possible to return a removed child to the home. Nothing in the Adoption Act placed any other specific requirement on the states or defined what "reasonable efforts" might entail.

42 U.S.C. 1396(b)(i) does not require any showing of a reasonable basis for a state to include or exclude any particular organ transplant. Plaintiff here likewise has no right enforceable under 42 U.S.C. 1983. Florida has complied with the federal requirements for written standards respecting the coverage of organ transplants and has determined that liver-bowel organ transplants are not a covered service.

Respectfully submitted,

s/ KAREL BAARSLAG
KAREL BAARSLAG,ESQUIRE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to U.S. Mail and Federal Express this 11th day of June, 1993 to Mary Anne Robertson, Legal Aid Service of Broward County, 609 S.W. First Avenue, Ft. Lauderdale, Florida 33301-1885 and William Kimble, 554 S. Summit No. 502, Ft. Worth, Texas, 76104.

/s/ KAREL BAARSLAG
KAREL BAARSLAG, ESQUIRE

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN,

Plaintiff,

by his next friend,
Ramona Pope

vs. CASE No. 93-6461
CIV-ROETTGER

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES Magistrate
Judge Seltzer

Defendant.
_____/

DEFENDANT'S POST-HEARING
MEMORANDUM OF LAW

The Defendant, Secretary, pursuant to leave granted during the hearing on the preliminary injunction on June 18, 1993 respectfully submits the following Memorandum of Law.

I. ARGUMENT

A. The Plaintiff has not demonstrated his entitlement to a preliminary injunction.

The Plaintiff has not met the requirements for the granting of a preliminary injunction as stated in Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974) because ~~2) the Plaintiff~~ does not state

a cause of action and 2) the Plaintiff has not shown imminent harm.

The Secretary is aware of only one case which has decided the issue of whether 42 USC 1396b(i) creates a right to an organ transplant operation enforceable by 42 USC 1983 when a State Medicaid program has opted not to cover it. That is the case of Tiffany Miller v. Gerald Whitburn, Case No. 93-C-096-C (W.D. Wisc. 1993) 1993 WL 89144 (copy previously furnished Court and counsel of record).

The Miller case supra also concerned a minor who was seeking a liver-bowel transplant as is LEXEN PITTMAN. Judge Crabb granted the Defendant State's motion to dismiss and denied the Plaintiff's claim for a preliminary injunction.

On page 16 of the Order the Court stated,

> "Section 1396b(i) contains no provision that could be said to create a right in a putative plaintiff to require a state to provide coverage for a particular transplant procedure. It requires the states that decide to cover transplants in their Medicaid plans to have written standards respecting the coverage of such procedures and it requires that the standards ensure fair treatment to similarly situated individuals. The latter requirement appears to create a right for an eligible

> Medicaid recipient if he or she is denied a procedure that the state has decided to cover in its plan if the denial is based on the recipient's diagnosis, type of illness or condition or if the state makes the procedures available on the basis of media or political considerations. However, nothing in the statutes suggests a congressional expectation that a Medicaid recipient has a judicially enforceable right to require a state to cover a particular transplant procedure it has not chosen to cover. (Emphasis added).

In Suter v. Artist M., _____, U.S. _____, 112 S.Ct. 1360, 1366 (1992) Chief Justice Rehnquist observed that the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. 620-628 was enacted by Congress pursuant to its spending power. The Supreme Court held the Act did not create a private cause of action enforceable by 42 U.S.C. 1983. The Medicaid Act, 42 U.S.C. 1396 et seq. is also the result of Congress' spending power. The reasoning of Pennhurst State School and Hospital vs. Holderman, 451 U.S. I, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) and Suter supra apply with equal force to 42 USC 1396b(i). The statutory section, 42 U.S.C. 1396b(i) sought to be enforced by the Plaintiff did not provide the Pennhurst unambiguous notice to the States.

Secondly, the only medical evidence submitted on behalf of the Plaintiff were the affidavit of Dr. Mario Tano (Exhibit 9) and Dr. David Drucker (Exhibit 10). On page 2 of Dr. Tano's affidavit, he makes the statement, "It is very difficult to say with precision what Lexen's life expectancy would be, if he does receive a transplant. However, based on his current physical condition and on the basis of reasonable medical probability, I would estimate that without a transplant, this infant will die within the next year."

The opinions of Dr. Drucker were general and not within a reasonable degree of medical probability.

Neither show that there is not time to have a hearing on the merits because of imminent harm to LEXEN PITTMAN as required by Northeastern Florida Chapter v. Jacksonville, Florida, 896 F.2d 1283 (11th).

B. The position of Medicaid has been consistent.

In Lisa Cooley v. Robert Williams, at paragraph 40, 916 of the Commerce Clearing House Medicare & Medicaid reporter, the court cites Ellis v. Patterson, 859 F.2d 52 (8th Cir. 1988) and states,

"I think that the State of Florida is under that same grant of discretion."

This recognizes that the issue of the States' option to exclude organ transplants from Medicaid covered services was presented.

In McLaughlin v. Williams, 801 F.Supp. 633, 636 (S.D. Fla. 1992), the Court decided only the experimental issue, "the central question" not the only issue raised.

In Alderman v. Williams, (M.D. Fla. 1992) Case No. 92-1388-Civ-T-99C (Copy previously furnished Court and counselor record) the Court held on page 3 of the Order "States may elect which, if any, organ transplants to cover."

Janet Tempkin did testify as to her belief that the EPSDT amendments allowed for the funding of heart transplants for persons under 21. However, the same written plan, Rule 10C-7.039 F.A.C., was introduced into evidence in Alderman, supra as the present case. The policy of the Secretary is to be found in the written plan, rather than the belief any one program administrator. The reason that heart transplants for persons under age 21 are covered services is that the written plan covers them.

C. Repeal of an Act of Congress by implication is not favored.

The position of the Plaintiff that the 1989 EPSDT amendments (the adding of definitions) 42 U.S.C. 1396d(r) repealed the States' option not to cover organ transplants requires the Court to ignore the wording of 196d(r), and the legislative history of the EPSDT amendments.

A cardinal rule of statutory construction is that repeals by implication are not favored. TUA v. Hill, 437 U.S. 1533, 57 L.Ed.2d 1171, 98 S.Ct. 2279. Morton v. Mancari, 417 U.S. 535, 41 L.Ed.2d 290, 94 S.Ct. 2474 (1974). The intention of the legislature to repeal must be clear and manifest. Pasadas v. National City Bank, 296 U.S. 497, 80 L.Ed.2d 351, 56 S.Ct. 349 (1936).

The position of the Eleventh Circuit is the same. United States v. Jordan, 915 F.2d 622 (11 Cir. 1990).

42 U.S.C. 1396d(r) defines "early and periodic screening, diagnostic, and treatment services" as 1) screening services, 2) vision services, 3) dental services, 4) hearing services and "5) such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of the section to correct or

ameliorate defects and physical and mental illness and conditions discovered by the screening services, whether or not such services are covered under the State plan."

It is internally inconsistent to list four specific categories of required services and then to include in subsection 5 all services whether or not covered by the State plan. It is like requiring Medicaid to treat children in 1) Ft. Lauderdale, 2) Miami, 3) Jacksonville, 4) Tallahassee and 5) anywhere in the State of Florida.

A reading of subsection 5 does not require this strained result. 42 U.S.C. 1396d(r)(5) requires the "necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section. . ." (Emphasis added). Subsection (a) of 42 U.S.C. 1396 has no mention of organ transplants. Only 42 U.S.C. 1396b(i) mentions organ transplants.

There is nothing in the legislative history of of the EPSDT amendments, House Conference Rep. 101-386 found in U.S. Code and Administrative News #4, 101st. Cong.. 1989 to support a repeal by implication either. There is no mention of eliminating the States' option not to cover organ transplants. Instead, it states,

"(1) States are required to provide any service that a State is allowed to cover with Federal matching funds under Medicaid that is required to treat a condition identified during a screen whether or not the service is included in the State's Medicaid plan" (Emphasis added).

States are not allowed to cover organ transplants unless there is a written plan. 42 U.S.C. 1396b(i) states,

"Payment under the preceding provisions of this section shall not be made -

(1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that -

(a) similarly situated individuals are treated alike; and

(b) any restriction, on the facilities or practitioners which may provide such procedures is consistent with the accessibility of high quality care to individuals eligible for the procedures under the State plan."

Simply put the Plaintiff is asking the Court to do what Congress did not: add the following language underlined to subsection (5) 42 U.S.C. 1396d(r) -

Notwithstanding the provisions of Section 1396b(i), "Such other necessary health care, etc.

II. CONCLUSION

In attempting to do the greatest good for the greatest number of persons, it is not possible to do all

things for all people all of the time. No Court that has addressed these issues has not agonized over the decision. However, courts have held that from the beginning Congress recognized that Medicaid could not cover all services. This is why the opening language of Medicaid 42 U.S.C. 1396 states,

> "Appropriations for the purpose of enabling each State as far as practicable under the conditions in such State to furnish (1) Medical assistance. . ." (Emphasis supplied).

Congress has given the States the option not to cover organ transplant operations and has not repealed it by the passage of the ESDPT amendments.

III. RELIEF SOUGHT

The Secretary requests:

1. That an Order be entered dismissing the Complaint for failure to state a cause of action, or

2. Deny the preliminary injunction, or

3. Both.

Respectfully submitted,

/s/ Karel Baarslag
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Senior Attorney
Florida Bar #217158
HRS Medicaid Office
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(904) 922-5822

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail and Fedex this 23rd day of June, 1993 to Mary Anne Robertson, Legal Aid Service of Broward County, 609 S.W. First Avenue, Fort Lauderdale, FL 33301-1885 and William Kimble, 554 S. Summit, No. 502, Fort Worth, Texas 76104.

/s/ Karel Baarslag
KAREL BAARSLAG, ESQUIRE

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN,

Plaintiff,

by his next friend,
Ramona Pope,

vs.

CASE No. 93-6461
CIV-ROETTGER

SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Magistrate Judge
Seltzer

Defendant.
_____/

MOTION TO DISMISS

The Defendant, Secretary, Department of Health and Rehabilitative Services to Rule 12 b 6 Fed. R.Civ. Pro. requests the Court to enter an Order dismissing the Complaint for failure to state a cause of action and as grounds would show:

1. That 42 USC 1396b(i) does not create a private cause of action to compel a State to fund a non-covered organ transplant operation pursuant to an action brought by 42 U.S.C. 1983. Miller v. Whitburn, Case No. 92-C-096-C (W.D. Wisc 1993) and Suter v. Artist M., 112 S.Ct. 1360 (1992).

2. That the Secretary wishes to have his pleading conform to his position taken in the supplemental memorandum filed in opposition to the granting of a preliminary injunction.

3. The supplemental memorandum is incorporated by reference as its memorandum of law.

WHEREFORE, the Secretary respectfully requests the Court enter an order dismissing the Complaint.

Respectfully submitted,

/s/ Karel Baarslag
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Senior Attorney
Florida Bar #217158
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/s/ Karel Baarslag
KAREL BAARSLAG, ESQUIRE

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN,

Plaintiff,

by his next friend,
Ramona Pope,

vs.

CASE No. 93-6461
CIV-ROETTGER

SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Magistrate Judge
Seltzer

Defendant.
_____/

ANSWER AND MOTION TO DISMISS

The Defendant, Secretary of Health and Rehabilitative Services answers the Complaint, without waiver of his motion to dismiss, as follows:

1. The allegations of paragraph 1 are admitted.

2. The allegations of paragraph 2 are admitted.

3. The allegations of paragraph 3 are admitted; however, the position is currently filed by the Lieutenant Governor who is the Acting Secretary.

4. The allegations of paragraph 4 are admitted, except as to 28 USC 1343 which are denied.

5. The allegations of paragraph 5 are denied and are the subject of the Motion to Dismiss.

6. The allegations of paragraph 6 are denied for lack of knowledge.

7. The allegation contained in the first sentence of paragraph 7 is admitted as being one of the reasons given in the agency denial letter. The second sentence allegation is admitted only as to the experimental issue, but denied as to the issue of the State's option to exclude organ transplants pursuant to 42 USC 1396b(i).

8. The allegations of paragraph 8 are denied.

9. The allegations of paragraph 9 are denied.

10. The allegations of paragraph 10 are denied for lack of knowledge.

11. The allegations of paragraph 11 are denied for lack of knowledge.

12. The allegations of paragraph 12 are denied.

WHEREFORE, the Defendant respectfully requests the Court to enter an order dismissing the Complaint.

Respectfully submitted,

/s/ Karel Baarslag
KAREL BAARSLAG, ESQUIRE
Senior Attorney

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/s/ Karel Baarslag
KAREL BAARSLAG, ESQUIRE

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN,

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SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Magistrate Judge
Seltzer

Defendant.
_____/

DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

The Defendant, Secretary, Florida Department of Health and Rehabilitative Services, hereby gives Notice of the Filing of the following supplemental authority to its post hearing memorandum:

1. Order of June 17, 1993 in the case of Alderman v. Williams, Case 92-1388-Civ-T-99C entered by the Honorable Harvey E. Schlesinger.

Respectfully submitted,

/s/ Karel Baarslag
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail and Fedex this 30th day of June, 1993 to Mary Anne Robertson, Legal Aid Service of Broward County, 609 S.W. First Avenue, Fort Lauderdale, FL 33301-1885 and William Kimble, 554 S. Summit, No. 502, Fort Worth, Texas 76104.

/s/ Karel Baarslag
KAREL BAARSLAG, ESQUIRE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES ALDERMAN,

Plaintiff,

v. Case No. 92-1388-Civ-T-99C

ROBERT B. WILLIAMS,
Secretary of the Florida
Department of Health and
Rehabilitative Services,

Defendant.

ORDER

This cause is before the Court Plaintiff's Motion for Summary Judgment (Doc. No. 25, filed April 30, 1993) and Defendant's Motion for Summary Judgment (Doc. No. 27, filed May 3, 1993).

Plaintiff, a forty year old male in need of a heart transplant seeks an order requiring Defendant to provide funding from the Florida Medicaid program for comprehensive transplant services in the form of a written guarantee to either Tampa General Hospital or Shands Medical Center. The guarantee would enable the Plaintiff to be placed on the active heart transplant list.

Plaintiff asserts that Defendant's refusal to provide funding for a heart transplant violates the Equal Protection Clause, in that Florida's Medicaid system would fund a heart transplant for a patient under the age of twenty-one.[1] Defendant argues that while states are not even required to provide any organ transplants under the federal Medicaid Act, Congress has vested the states with discretion to determine the extent of transplant coverage, if any.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). A

[1]The Florida Department of Health and Rehabilitative Services has a written policy stating that it does not provide funding for heart transplants for Medicaid recipients over the age of twenty-one. See Fla. Admin. Code § 10c-7.039 (1992).

moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out to the Court that there is an absence of evidence to support the non-moving party's case. Celotex, 477 U.S. at 325. Rule 56 permits the moving party to discharge its burden with our without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. Id. When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. Id. at 324.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, Key West Harbor v. City of Key West, No. 92-4038, slip. op. 1486, 1490 (11th Cir. April 2, 1993), and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir. 1989). The nonmovant need not be given the benefit of every

inference, but only of every "reasonable" inference. Brown v. City of Clewiston, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need note more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonable may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. Augusta Iron and Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir. 1988). It must be emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgment motion. Rather, "the requirement is that there be non genuine

issue of material fact." Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247-48 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

Plaintiff's equal protection claim has been raised before the Court previously, in the form of Plaintiff's Motion for a Preliminary Injunction (Doc. No. 1, filed September 24, 1992). The Court extensively addressed Plaintiff's claim in its Order denying that Motion (Doc. No. 13, filed October 1, 1993), and will not reexamine this issue at length herein. The Court hereby fully incorporates herein its previous Order (Doc. No. 13), and would merely reiterate its primary findings, which are equally applicable to the instant summary judgment motions.

The Court finds that Florida's decision to limit public funds available for heart transplants to patients under 21 years of age is neither arbitrary nor unreasonable, and does not violate the federal Medicaid

scheme. It is reasonable for Defendant to use a recipient's age as an objective criterion for allocating public funds for heart transplants. Furthermore, the Americans With Disabilities Act ("ADWA"), 42 U.S.C. §12101 et seq. (1992 Supp.), offers Plaintiff no relief because Florida's decision to not subsidize his heart transplant was based, as conceded by Plaintiff, upon his age, not upon any disability.

The Court agrees with the holding in a factually analogous case from Arizona, where liver transplants were authorized only for persons under 18 years of age, and the claimant was denied subsidy on that basis. In pertinent part, the court there held:

> Age is, of course, a clear principle that can be consistently applied. Nor is youth an unreasonable or arbitrary factor in spending public funds. If the state is free not to fund any transplants, we see nothing unreasonable in spending some money to benefit those who will have the longest remaining life as a result of the procedure. There being a rational basis for the statutory differentiation, plaintiffs' equal protection claims under the state and federal constitution also fail.

Salgado v. Kirschner, 836 P.2d 995, 996-97 (Ariz. App. Div. 2 1992) (footnote and citations omitted.)

The Supreme Court has previously recognized the states' "longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid." Alexander v. Choate, 469 U.S. 287, 307 (1985); see also Beal v. Doe, 432 U.S. 438, 444 (1977). Moreover, a state's classification having some reasonable basis "does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " Dandridge v. Williams, 397 U.S. 471, 485 (1970) (citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

The widespread problem of transplant availability does not go unnoticed by this Court, which reiterates that it is sympathetic to the plight of Plaintiff, and others similarly situated. These are delicate cases, often presenting issues not easily answered. However, the choice to provide transplant and other medical funding, and the extent of these allocations, are decisions to be made by state officials and legislatures, not federal courts. Substantial debate over health care reform again has reached social and political spheres—and legislative agendae—but not upon the initiative of the courts.

Rather, this movement has been effected by personal efforts of the citizens of Florida, and the rest of the country, to remedy perceived unfairness and inefficiency in the provision of health services. This energy is most successful when directed at the legislative and executive branches of government, who are best equipped, and most appropriate, to respond to such petition.

As for federal courts, however, the Supreme Court has eloquently stated that the day is long gone when the Fourteenth Amendment is used "to strike down state laws. . .because they may be unwise, improvident or out of harmony with a particular school of thought." Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955). Instead, "[f]or protection against abuses by legislatures, the people must resort to the polls, not to the courts." Id. (citing Munn v. Illinois, 94 U.S. 113, 134 (1876). See also Dandridge, 397 U.S. at 487 ("intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the [Court's] business;" Constitution does not empower the Court to "second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients").

Accordingly, the Court concludes that Plaintiff's equal protection and AWDA claims are without merit. Accordingly, Plaintiff is entitled to neither declaratory nor injunctive relief, Plaintiff's Motion for Summary Judgment (Doc. No. 25) is **DENIED**, and Defendant's Motion for Summary Judgment (Doc. No. 27) is **GRANTED.**

The Clerk is directed to enter judgment on behalf of Defendant and close the file.

DONE AND ORDERED at Jacksonville, Florida, this 17th day of June, 1993.

/s/ HARVEY E. SCHLESINGER
HARVEY E. SCHLESINGER
United States District Judge

Copies to:

William Kimble, Esq.
Clyde Collins, Esq.
Gordon Scott, Esq.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN, by his next friend, Ramona Pope,

Plaintiff,

v. Case No. 93-6461-CIV-ROETTGER

Secretary, Florida Department of Health and Rehabilitative Services,

Defendant

_____/

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

Plaintiff seeks injunctive and declaratory relief against the Florida Department of Health and Rehabilitative Services. Plaintiff claims under 42 U.S.C. §1983 that he has been denied a right to which he is entitled under the Medicaid Act.

I. FACTUAL BACKGROUND

Plaintiff, Lexen Pittman, ("Lexen") is a 13 month old infant suffering from short-bowel syndrome. When he was 7 days old, part of his small intestine was resected in radical surgery; as a result his body is unable to absorb nutrients. His life is sustained by total parenteral nutrition

("TPN"), a form of intravenous feeding. The TPN has compromised Lexen's liver function and he is suffering from liver failure.

There is no cure for short-bowel syndrome. It is inevitable that Lexen's liver will continue to deteriorate, ultimately causing complications which will jeopardize his life. A comprehensive liver-bowel transplant, which is currently performed only at the University of Pittsburgh Children's Hospital, might save Lexen's life. Without the transplant he is likely to die of liver failure, probably within one year.

Inasmuch as Lexen is a Florida Medicaid recipient, his mother applied to the Florida Department of Health and Rehabilitative Services ("HRS") for transplant coverage. HRS denied the request on the ground that the transplant was experimental and therefore the agency was not required to fund it. Thereafter, Lexen filed this action, pursuant to 42 U.S.C. §1983, contending HRS denied rights to which he is entitled under the Medicaid Act, 42 U.S.C. §1396, et seq. ("the Act"). Specifically, Plaintiff seeks a declaration of his rights under the Act and a preliminary injunction requiring Defendant HRS to provide a liver-bowel transplant and all incidental

medical services such as pre-transplant diagnostic testing, transportation to Pittsburgh, hospitalization and post-transplant services and medication. Jurisdiction is present. 28 U.S.C. §1331.

A status conference was held to consider the most expeditious manner for resolution of the Plaintiff's motion. At that time HRS advised the Court that while it was not conceding that liver-bowel transplants are no longer within the experimental realm, HRS would not defend the denial of the transplant in this particular case on the ground that is was experimental.[1] Rather, HRS represented that its only defense would be that the statute vests the agency with the discretion to exclude transplant coverage for Medicaid recipients, regardless of their age.

Therefore, the only issue for the Court's consideration is whether the Medicaid statute requires HRS to fund all medically necessary transplants for Medicaid recipients under age 21, or whether HRS may, in its discretion, decide whether to fund certain transplants at all, regardless of the patient's age.

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[1] The Court makes no finding regarding the experimental or non-experimental status of the liver-bowel transplant, as that issue is not before the Court.

II. STANDARD FOR INJUNCTIVE RELIEF

It is well established in this Circuit that in order to succeed on a motion for preliminary injunction pursuant to Federal Rule of Civil Procedure 65, the movant must carry the burden of persuasion on all four of the prerequisites for injunctive relief. Canal Authority of Florida v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974).[2] Specifically, the movant must demonstrate (1) a substantial likelihood of success on the merits of the case; (2) a substantial threat of irreparable injury if relief is denied; (3) that the threatened injury to the plaintiff outweighs the threatened harm the injunction may cause the defendant; and (4) that the entry of a preliminary injunction serves some discernible public interest. Tally-Ho, Inc. v. Coast Community College District, 889 F.2d 1018, 1022 (11th Cir. 1989).

The district court is vested with the discretionary power to grant injunctive relief. United States v. Lambert, 695 F.2d. 536, 539 (11th Cir. 1982); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328,

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[2]Decisions of the Fifth Circuit Court of Appeals handed down on or before September 30, 1981, are established precedent for the Eleventh Circuit. Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981).

332 (5th Cir. 1981). In exercising its discretion, the Court is guide by established rules and principles of equity jurisprudence. Muss v. City of Miami Beach, 312 So.2d 553, 554 (Fla. 3d DCA), cert. denied, 321 So.2d 553 (Fla. 1975). The court is mindful that a preliminary injunction is an "extraordinary and drastic" remedy: the exception and not the rule. Canal Authority v. Callaway, 489 F.2d at 573.

A. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

The main issue before the Court is whether Plaintiff has a substantial likelihood of success on the merits.

1. Statutory Background

Medicaid is a cooperative state-federal program intended to make medical care available to people otherwise unable to afford it. State participation in the program is voluntary, however, once a state elects to participate, it must comply with certain requirements of Title XIX of the Social Security Act, commonly known as the Medicaid Act, 42 U.S.C. §1396 et seq, . Florida is a participating state.

At minimum, a state must fund seven categories of mandatory medical services in order to qualify for federal funds. 42 U.S.C. §1396(a)(10)(A). Mandatory services include, among others, early and periodic screening, diagnosis, and treatment ("EPSDT") for persons under age 21, as defined in 42 U.S.C. §1396d(r). Additionally, states may, at their option, provide other categories of services, such as organ transplants. 42 U.S.C. §1396b(i) (enacted 1986).[3] However, it is clear that states have the option not to cover transplants at all.

In the 1985 House Report, the Committee took care to specify that participating states are not required to cover any organ transplants, even if they are medically necessary. H. Rep. No. 265, 99th Congress, 1st Sess. 74 (1985); See Dexter v. Kirschner, 972 F.2d 1113 (9th Cir.

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[3] This section provides in pertinent part:

Payment under the preceding provisions of this section shall not be made —

(1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that —

(A) similarly situated individuals are treated alike; and

(B) any restriction on the facilities or practitioners which may provide such procedures, is consistent with the accessibility of high quality care to individuals eligible for the procedures under the State plan.

1992); Muesberger v. Palmer, 900 F.2d 1280 (8th Cir. 1990); and Ellis v. Patterson, 859 F.2d 52 (8th Cir. 1988). The only requirement is that if a state decides to provide transplants it must promulgate "formal written standards and apply them fairly and uniformly." H. Rep. No. 265, 99th Congress, 1st Sess. 74 (1985). Florida Medicaid has opted to cover certain transplants, but not the liver-bowel transplant Plaintiff seeks here.

The Medicaid Act was amended in 1989 as part of the Omnibus Budget Reconciliation Act. The present version of Section 1396d(r) requires states to provide eligible individuals under age 21 certain specifically enumerated services viz., (1) screening services, (2) vision services, (3) dental services, (4) hearing services, and, under subsection (5) of Section 1396d(4), "[s]uch other necessary health care. . . described in subsection (a) of this section to correct to ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 U.S.C. §1396d(r)(5). No legislative history exists to shed light on this provision.

Subsection (a), which is cross-referenced in the amendment, lists a variety of medical services whose coverage is either mandatory or permissible under state Medicaid plans. Transplants are permissible.

2. Statutory Analysis

Plaintiff contends that the language "whether or not such services are covered under the State plan," which appears in §1396d(r)(5), divests participating states of all discretion to regard medically necessary treatment option if the patient is under 21. Lexen's transplant is medically necessary and he is under age 21. Therefore, he argues he has a legally enforceable right to a liver-bowel transplant even though Florida has specifically decided not to fund liver-bowel transplants. In response HRS argues there is no direct conflict between sections §1396b(i) and §1396(r)(5), and even if there is, the former prevails over the latter.[4]

The Court is persuaded by Defendant's reasoning in this case. The apparent conflict between the two provisions at issue is illusory. The 1989 amendment to

[4] Florida does fund heart transplants for qualified patients but only if they are under twenty-one. See Alderman v. Williams, No. 92-1388-Civ-T-99C (M.D. Fla. 1992).

§1396d(r) simply required that children who were screened for the services enumerated in that section must receive those services. Subsection (5) was not intended as a "catch-all" provision which would require the state to fund every service deemed medically necessary.[5] Rather, because §1396d(r)(5) refers back to subsection (a) of §1396, it is listed to that reference, which lists all the requirements for a state plan of which organ transplants is not one.

Alternatively, even if these provisions are in direct conflict, the Court is persuaded by the reasoning of Judge Crabb in Miller v. Whitburn, 816 F.Supp. 505 (W.D. Wis. 1993). Given the extent and detail of the legislative history supporting Defendant's contention that §1396b(i) gave states discretion whether to authorize transplant procedures, and the lack of any evidence that Congress intended to support Plaintiff that a §1396d(r)(5) strips the states of their discretion to deny organ transplants to patients under 21, this Court is unwilling to assume Congress did not mean what it said when it so carefully

[5] If a new organ transplant were suddenly feasible and deemed medically necessary for a qualified patient under twenty-one, but the cost was 200 million dollars rather than only $500,000 to one million dollars, as here, then Plaintiff's argument was require a state to provide the transplant

deliberated on the matter of organ transplants. In colorful language from another case, but quite appropriate to this statutory construction issue: "In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." Harrison v. PPG Indus. Inc., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting). Adopting Plaintiff's interpretation of §1396d(r)(5) would be tantamount to an implied repeal of §1396b(i), which is not a favored construction in the law.

Six days after the Court held its final hearing on Plaintiff's motion, the Fourth Circuit Court of Appeals rendered its decision in Pereira v. Kozlowsky, _____ F.2d _____ (4th Cir. 1993). The Pereira Court was faced with the same problem of statutory construction presented here. The Court found that the two provisions at issue do not conflict, but rather complement one another. Based on this reading, the Court held that the plain language of the statute (§1396d) required the state to fund medically necessary transplants to children under age twenty-one who are otherwise qualified under the state's Medicaid

Plan, even though the Plan did not include written standards for the procedure at issue. The undersigned is not persuade that the sections can be harmonized in this way and finds the reasoning of Miller more persuasive.

Although the Fourth Circuit criticized the holding of the Eighth Circuit in Ellis v. Patterson as "dicta," this Court notes the question in Pereira was basically moot as the minor plaintiff had already received a liver-bowel transplant pursuant to the District Court's decision.

Based on the foregoing, it does not appear that Plaintiff is substantially likely to succeed on the merits of his claim. Although Plaintiff's burden of persuasion on this factor may be construed more liberally where the threatened harm to Plaintiff is severe, which in this case is undeniable, likelihood of success on the merits may not be totally discounted. Canal Authority, 489 F.2d at 576.

B. SUBSTANTIAL THREAT OF IRREPARABLE INJURY TO PLAINTIFF

Upon review of this affidavits and medical reports provided by Lexen's doctors, there is no doubt that the threatened injury to Lexen Pittman is manifest, although it is not necessarily imminent. Counsel for Plaintiff represented to the Court at the preliminary injunction

hearing, that a decision could wait for several days as Plaintiff's health was not in immediate jeopardy.

Nevertheless, the Court is mindful that while Lexen is currently in stable condition, his prognosis is poor. The nature of the disease makes it inevitable that his liver failure will progress and that he will suffer a multitude of complications. If Lexen does not receive a transplant while he is relatively stable, he may deteriorate to such a condition that it would no longer be possible to perform the operation. Children with Lexen's condition are likely to die in infancy. A liver-bowel transplant is his only hope for survival.

C. BALANCE OF HARMS BETWEEN PLAINTIFF AND DEFENDANT

The threatened harm to Lexen if he does not receive a transplant is severe and drastic: his life is at stake. In the face of this harsh reality, it is difficult to envision how the Defendant, a service agency of the state, could possibly be harmed by the issuance of an injunction. However, the harm to Defendant, while only monetary and not mortal, is also substantial.

The cost of this operation ranges from $300,000 to $500,000 dollars and up, depending on post-operative

complications, length of hospital stay, and other factors which cannot possibly be predicted. Faced with this high and uncertain cost, the state's responsibility to its other recipients may be compromised. Miller v. Whitburn, 816 F.Supp. 505, 508 (W.D. Wis. 1993). As discussed infra, Defendant will be harmed if it is unable to fulfill its congressionally mandated duty to provide the most care to the greatest number on a limited budget.

D. THE PUBLIC INTEREST

The public's interest in the sanctity of human life is well-established and substantial. In this case, that interest may be fairly interpreted in two ways. The public's interest in ordering HRS to fund Lexen's transplant is straightforward and immediately apparent. Lexen needs a liver-bowel transplant which he can not afford. He will die without it. By ordering HRS to fund the transplant, the public's interest in human life is advanced in a tangible, direct, and meaningful way.

However, the public also has an interest in having a Medicaid program which provides a wide range of basic health services to the neediest members of the community. The stated goal of Medicaid is utilitarian: to enable each state, "as far as practicable," to furnish

medical assistance on behalf of families with dependent children, as well as for aged, blind, or disabled individuals whose income and resources are insufficient to meet the cost of necessary medical services. 42 U.S.C. §1396. The state must "provide the largest number of necessary medical services to the greatest number of needy people." Ellis v. Patterson, 859 F.2d 52, 55 (8th Cir. 1988). Therefore, discerning the public's interest in this particular case requires the court to examine the entire context, not just this Plaintiff's particular circumstances.

If the purpose of Medicaid is to improve and maintain the quality of life for millions of people, a denial of relief to a single individual does not necessarily disserve the public interest. When viewed globally, the public's interest in health for its citizens is as well served by the denial of relief in this case as by its grant. Miller v. Whitburn, 816 F.Supp. 505, 508 (W.D. Wis. 1993).

III. CONCLUSION

This is a difficult issue of first impression[6] in this District which is complicated by a highly charged

[6] A liver-bowel transplant case was heard in this district last year. McLaughlin v. Williams, 801 F.Supp. 633 (S.D. Fla. 1992). In that case, Judge Marcus held that HRS was required to fund Plaintiff's liver-bowel

emotional context. Put only in the emotional appeal of a child for a chance at a healthy life, Defendant HRS' denial of Plaintiff's request for funding of a necessary transplant seems cold and heartless.

Defendant is the steward of Florida's Medicaid program and the Congress has entrusted the states with discretion as to organ transplants. HRS has approved certain transplants but not this one.

This Court has not been asked to decide if approving this transplant is a good thing. Such is not a judge's function. The Court must decide if Plaintiff has a federally enforceable right to compel HRS to fund the liver-bowel transplant. The Court concludes the law does not give Plaintiff such a right.

Therefore, for the foregoing reasons, it is

ORDERED AND ADJUDGED that Plaintiff's motion for preliminary injunction is DENIED.

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transplant on the ground that it was not experimental. However, the McLaughlin Court was only presented with the "experimental" defense, not the statutory defense raised here. The Court held that the liver-bowel transplant was not experimental. However, the Court assumed without deciding, that a liver-bowel transplant was a mandatory service under §1396d(a).

Likewise, in Alderman v. Williams, supra note 4, Judge Schlesinger stated in dictum that the Medicaid statute requires participating states to provide more services to recipients under twenty-one. However, that Court was also not faced with the precise issue raised here.

DONE AND ORDERED this 19th day of July 1993.

/s/ NORMAN C. ROETTGER
NORMAN C. ROETTGER
CHIEF UNITED STATES DISTRICT
COURT JUDGE

cc: counsel of record

UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No:_____

LEXEN PITTMAN
Plaintiff-Appellant

by his next friend,
Ramona Pope

v.
SECRETARY, FLORIDA
DEPARTMENT OF HEALTH
AND REHABILITATIVE
SERVICES,
Defendant-Appellee.
_____/

On Appeal from the
United States District Court for
The Southern District of Florida

PLAINTIFF-APPELLANT'S MOTION FOR AN INJUNCTION PENDING APPEAL

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UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

LEXEN PITTMAN

No:_____

Plaintiff-Appellant

by his next friend,
Ramona Pope,

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant-Appellee.

_____/

PLAINTIFF-APPELLANT'S MOTION FOR
AN INJUNCTION PENDING APPEAL

Pursuant to Rule 8(a), Fed. R. App. P. Plaintiff Lexen Pittman, a 14-month-old infant, respectfully urges this Court to grant an injunction pending appeal and would show the Court as follows:

1. This appeal involves the tragic predicament of a baby—otherwise sturdy, health and beautiful—who will most likely die within a year, if he does not receive a liver/small intestine transplant. In the interim, this child's death from the ravages of gastrointestinal bleeding or infection is a clear and present danger. He could experience rapid deterioration at anytime.

2. Because the Florida medicaid agency does not in this case content that liver/small intestine transplants are experimental, only a pure law question is presented.

3. Plaintiff relies on his pleadings, evidence, and briefs previously filed in the District Court. The District Court took over thirty days to issue the denial of the Preliminary Injunction, therefore, Plaintiffs seek a stay from this Court, rather than the District Court to prevent further delay.

4. Plaintiff urges this Court to immediately issue an injunction pending appeal, requiring the defendant Secretary of HRS to provide funding for comprehensive transplant services for Lexen Pittman.

I. STATEMENT OF THE CASE

On June 1, 1993, Plaintiff filed a Complaint and Motion for Temporary Injunction as an emergency matter. (App. 51) On June 3, 1993, the Court held a telephone status conference at which the Judge ordered that the parties submit further briefs (Appendix 58 and 93). Hearing on the Motion for Preliminary Injunction was scheduled and held on June 14, 1993 and concluded on June 18, 1993. The exhibits which were submitted

into evidence at the hearing are listed in the appendix at 1 through 50. Subsequent to the hearing, Plaintiff submitted to the Court as supplemental authority, Pereira v. kozlowski, No. 92-2529 (4th Cir., June 24, 1993). (App. 121). Defendants submitted supplemental authority. (App. 131) On July 1993, the District Court rendered the Order denying Plaintiff's Motion for Preliminary Injunction (App. 138).

II. STATEMENT OF THE FACTS

Plaintiff Lexen Pittman is a 13-month-old infant who suffers from short-bowel syndrome. His life is sustained by intravenous feeding in the form of Total Parenteral Nutrition (TPN). The TPN compromises his liver function and will eventually result in liver failure. Lexen has had numerous hospitalizations at Broward County General Hospital for various reasons, including infections, central line supsis, and internal bleeding. He requires comprehensive transplant services for a liver/intestine transplant. Subsequent to the hearing on June 18, 1993, he was released from the hospital to the care of his mother and then re-admitted for a short period of time because of a leak in the intravenous line. He currently resides with his mother. The affidavits of

Doctors Mario Tano and David Drucker specifically describe the critical need for Plaintiff to be placed immediately on the transplant list in order to survive. (App. 20 & 25) It is critical that he begin the evaluation process with the University of Pittsburgh transplant program as soon as possible so that he can be placed on the active transplant waiting list at the Children's Hospital of Pittsburgh.

III. STATEMENT OF THE ISSUES

Whether Title 42§ 1396 d(r)(5) requires the Medicaid Program to guarantee financial coverage for a liver/intestine transplant for Plaintiff.

IV. ARGUMENT

Title 42 §1396d(r)(5) mandates that Plaintiff be granted the relief requested. He incorporates the Complaint and Motion for Preliminary Injunction and the Brief in Support of His Motion for Preliminary Injunction which have been attached at App. 51 and 58 herein by reference.

Additionally, Plaintiff submits that Pereira v. Kozlowski, No. 92-2529 (4th Cir., June 24, 1993) which was submitted to the trial Court subsequent to the hearing

unequivocally supports Plaintiff's position. (App. 121). Pereira held that 42 §1396d(r)(5) mandated coverage for the type of medically necessary heart transplant at issue in that case for participants under the age of 21. The court went further then the lower court in finding that §1396b(i)(1) did not give the states unqualified discretion whether to fund any transplants. Accordingly, no need existed to find that §1396d(r)(5) superseded §1396b(i)(1) because the provisions were complementary.

Since defendant conceded at the telephone status conference that the liver/bowel transplant in the case at hand would not be deemed as experimental, and they did not contest the factual allegations, their only remaining argument was that states were not required to fund any organ transplants under the Medicaid Act, even those for children under 21. The recent Pereira decision obliterates their argument. Furthermore, it negates the erroneous reasoning of Miller v. Whitburn, 816 F.Supp. 505 (W.D. Wis. 1993), appeal docketed, No. 93-1976 (7th Cir. argued June 10, 1993) upon which the District Court in the case at hand relied.

As indicated in the attached briefs and exhibits, Plaintiff has also shown that the Health Care Financing

Administration has interpreted the 1989 amendment to EPSDT to mandate medically necessary transplant coverage. (See App. 9, 15, 18)

CONCLUSION

Plaintiff requests the Court to grant an injunction pending appeal requiring the Defendant Secretary of HRS to provide funding for comprehensive transplant services for Lexen Pittman.

Respectfully submitted,

/s/ MARY ANNE ROBERTSON
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to Karel Baarslag, Esq., and Gordon Scott, Esq., Florida Department of HRS, Office of General Counsel, 1317 Winewood Blvd., Bldg. 3, Room 103, Tallahassee, FL 32399, this 22nd day of July, 1993.

/s/ MARY ANNE ROBERTSON
MARY ANNE ROBERTSON

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

LEXEN PITTMAN,

Plaintiff-Appellant

by his next friend,
Ramona Pope,

vs. CASE NO.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant-Appellee.

_____/

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN INJUNCTION PENDING APPEAL

The Defendant-Appellee, SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, by and through his undersigned counsel, respectfully requests the Motion for an Injunction Pending Appeal be denied as no new issues of law were raised in his Motion for An Injunction Pending Appeal which were not previously considered by the Honorable Norman C. Roettger, Chief United States District Court Judge. The Secretary, Florida Department of Health and Rehabilitative Services relies upon his

previously filed Memoranda of Law In Opposition to the Granting of a Preliminary Injunction, complete copies of which are attached hereto and incorporated herein as Defendant-Appellant's Composite Exhibit 1, and argument presented on June 14th and June 18, 1993.

(1) The Defendant-Appellee further states that the Plaintiff-Appellant has failed to comply with the requirements of Rule 8(a), Federal Rules of Appellate Procedure, by not showing that application to the district court had denied an application for stay, or has failed to afford the relief of a stay.

(2) The Plaintiff-Appellant has failed to supply affidavit or other sworn statements showing the present physical condition of the child, and the emergency nature of his condition that requires an Injunction be entered pending appeal.

(3) The Plaintiff-Appellant has raised no new arguments that it has a federally enforceable right to compel the Defendant-Appellee to fund the liver-bowel transplant.

Respectfully submitted,

/s/ GORDON B. SCOTT
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 23rd day of July, 1993 to Mary Anne Robertson, Esquire, Legal Aid Service of Broward County, 609 S.W. First Avenue, Fort Lauderdale, Florida 33301-1885 and William Kimble, Esquire, 554 S. Summit, No. 502, Fort Worth, Texas 76104.

/s/ GORDON B. SCOTT
GORDON B. SCOTT, ESQUIRE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4783

(D.C. Docket No. 93-6461-CIV-NCR)

LEXEN PITTMAN,
by his next friend, Ramona Pope,

Plaintiff-Appellant,

versus

SECRETARY,
FLORIDA DEPARTMENT OF HEALTH
& REHABILITATIVE SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 3, 1993)

Before ANDERSON, EDMONDSON and COX,
Circuit Judges.

PER CURIAM:

Lexen Pittman, through his mother Ramona Pope, as his next friend, brought this 42 U.S.C. § 1983 action alleging that the Secretary of the Florida Department of Health and Rehabilitative Services ("the Secretary") deprived him of rights to which he is entitled under 42 U.S.C. § 1396, et seq, ("the Medicaid Act"). He sought a preliminary injunction requiring the Secretary to pay for a liver-bowel transplant and incidental treatment. The court denied his request for a preliminary injunction. He appeals.

Lexen filed a motion to expedite the appeal on July 23, 1993, which we granted. Due to the exigency of the situation, we heard oral argument on July 28. On July 29, we entered an order vacating the order of the district court and remanding the action with instructions to enter an appropriate preliminary injunction.[1] We noted in that order that the preparation and filing of a comprehensive opinion was deferred to expedite disposition of the appeal, but that we would file a comprehensive opinion forthwith. We now do so.

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[1] That order follows this opinion as an Appendix.

FACTS AND PROCEDURAL HISTORY

The facts in this case are essentially undisputed. Lexen is a fifteen-month old child, who has received medical assistance through Florida's Medicaid program. He was screened under the state's early and periodic screening, diagnostic and treatment (EPSDT) program on April 29, 1992, the day after his birth.[2]

Lexen suffers from short-bowel syndrome. As a result of his illness, Lexen's body is unable to absorb nutrients. He is, therefore, completely dependent upon total parenteral nutrition, a form of intravenous feeding. Total parenteral feeding compromises his liver function. His doctors believe that a liver-bowel transplant could save Lexen's life. The cost of the transplant procedures is estimated to be between $300,000 and $500,000, or more,

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[2]Section 1396d(a)(4)(B) of the Medicaid Act requires participating states to provide EPSDT services to eligible recipients under age 21. On April 1, 1991, Florida amended its state Medicaid plan by adding a provision which includes the following:

> EARLY AND PERIODIC SCREENING AND DIAGNOSTIC OF INDIVIDUALS UNDER 21 YEARS OF AGE, AND TREATMENT OF CONDITIONS FOUND:
>
> All services provided for in 42 U.S.C. § 1396d(a) which are medically necessary to correct or ameliorate defects and physical and mental illnesses and conditions are provided for EPSDT participants.
>
> (4a) 1. Screen examinations are scheduled to occur at birth, two months, four months, six months, . . .

depending upon post-operative complications, length of hospital stay, and other unpredictable factors. (R.1-22 at 10.) Without the transplant, he is likely to die of liver failure within one year. One of his doctors has also stated that he is immediately susceptible to a variety of infections, which could so worsen his condition that a liver-bowel transplant would not be recommended or feasible.

Lexen's mother applied to the Florida Department of Health and Rehabilitative Services (HRS) for coverage of a liver-bowel transplant and incidental medical treatment. The Secretary denied the request, contending that the transplant was experimental and, thus, Florida is not required to fund it. Following that denial, Lexen filed this action in district court, contending that the Secretary had denied him federal rights guaranteed by Medicaid. The plaintiff sought a preliminary injunction requiring the Secretary to provide funding for a liver-bowel transplant and incidental medical treatment, including transportation to the University of Pittsburgh Children's Hospital for the surgery.

At a status conference, the Secretary advised the court that although HRS was not conceding that liver-

bowel transplant procedures are not experimental, the Secretary would not defend the denial of the transplant in this case by arguing that it is experimental. (District Court Opinion, R.1-22 at 2.) Rather, the Secretary represented that HRS's only defense would be that the statute vests Florida and other participating states with the discretion to exclude transplant coverage for Medicaid recipients, regardless of their age, and that Florida has not elected to include liver-bowel transplants. (Id.) The district court held first, that the Medicaid Act does not require states to cover all medically necessary treatment for eligible participants under age twenty-one. Alternatively, 42 U.S.C. § 1396b(i)(1) gives states the discretion not to provide transplant services for such recipients. The court, therefore, denied the request for a preliminary injunction.

ISSUE ON APPEAL AND CONTENTIONS OF THE PARTIES

On this appeal, the Secretary presents a single argument: He argues that 42 U.S.C. § 1396b(i)(1), a subsection of the Medicaid Act, gives Florida discretion to elect not to provide payment for a liver-bowel transplant and incidental medical treatment for Lexen

Pittman, a qualified Medicaid recipient under age twenty-one. Lexen disagrees, arguing that the states have no such discretion.[3]

STANDARD OF REVIEW

We review the district court's denial of a preliminary injunction for abuse of discretion. Tally-Ho, Inc. v. Coast Community College District, 889 F.2d 1018, 1022 (11th Cir. 1989). If the district court denies preliminary injunction based on an error of law, then we must correct that error without deference to the court's determination of the legal issue. Id. at 1022.

DISCUSSION

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[3] In opposing Lexen's assertion that 42 U.S.C. § 1396d(r)(5) requires funding for this transplant, the Secretary argues that § 1396b(i)(1) gives the states discretion to elect not to cover organ transplants for children under age twenty-one. We address and reject that argument in the text. Thus, we need not, and we expressly do not, address other possible issues, including, but not limited to: (1) whether the decision to exclude liver-bowel transplants from coverage under the state plan was made pursuant to reasonable standards consistent with the Medicaid Act appropriately imposed by the state pursuant to 42 U.S.C. § 1396a(a)(17), see Beal v. Doe, 432 U.S. 438, 444-45, 97 S.Ct. 2366, 2370-71 (1977); (2) whether this transplant is medically necessary; (3) whether "necessary health care" in § 1396d(r(5) means reasonable health care so that the total circumstances, including (but not limited to) probability of a successful outcome would be considered even in cases in which a particular treatment offers the only possibility for the patient's survival; (4) what are the circumstances that may be considered if "necessary" in § 1396d(r)(5) means the same thing as reasonable; and (5) whether "discovered by the screening services" as used in § 1396d(r)(5) is a phrase of limitation and, if so, what does it mean in application.

The Medicaid Act establishes a state and federal cooperative program, in which states may choose to participate. Once the state agrees to participate in the program, it must establish a plan that meets stated requirements. Through Medicaid participation, the state is eligible to receive federal funds to cover a percentage of the cost of the medical services it provides. As a requirement of participation, the state must prove certain types of services to lower income individuals.[4] These services include but are not limited to inpatient hospital services, outpatient hospital services, nursing services, physician's services, and early and periodic screening, diagnostic, and treatment services (EPSDT) for qualified aid recipients under age twenty-one. See 42 U.S.C. § 1396d(a)(1) through (5), (17), and (21). Subsection (r)(5) of section 1396d provides:

> The term "early and periodic screening, diagnostic, and treatment services" means the following items and services:
>
> . . . .
>
> (5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this

[4] These services are described in § 1396d(a)(1) through (5), (17), and (21). See 42 U.S.C. § 1396(a)(10).

> section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

42 U.S.C.A. § 1396d(r)(5) (West 1992 & Supp. 1993) (emphasis added).

Lexen contends that the above-quoted subsection (r)(5) entitles him to coverage for all necessary care, whether or not covered under Florida's medical assistance plan. Stated otherwise, he contends that subsection (r)(5) mandates coverage for all medically necessary treatment. The language of subsection (r)(5) appears to mandate coverage for all medically necessary treatment for eligible recipients under age twenty-one. See Pereira v. Kozlowski,, No. 92-2529, 1993 WL 220590, at *3 (4th Cir. June 24, 1993); McLaughlin v. Williams , 801 F.Supp. 633, 637 n.3 (S.D. Fla. 1992).

Subsection (1) of § 1396b(i) provides:

> Payment under the preceding provisions of this section shall note made —
>
> > (1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage or such procedures and unless such standards provide that —

> (A) similarly situated individuals are treated alike; and
>
> (B) any restriction, on the facilities or practitioners which may provide such procedures, is consistent with the accessibility of high quality care to individuals eligible for the procedures under the State plan;
>
> . . . .
>
> Nothing in paragraph (1) shall be construed as permitting a State to provide services under its plan under this subchapter that are not reasonable in amount, duration, and scope to achieve their purpose.

42 U.S.C.A. § 1396b(i)(1) (West 1992 & Supp. 1993). This subsection can be read as merely stating conditions for federal funding of organ transplants. On the other hand, it can be read as an affirmative grant to the states of discretion to elect not to provide coverage for organ transplants. Courts differ as to the proper construction.

The Eighth and Ninth Circuits have held that § 1396b(i)(1) gives discretion to the states to decide whether to fund organ transplants. Mesuberger v. Palmer, 900 F.2d 1280, 1282 (8th Cir. 1990); Ellis v. Patterson, 859 F.2d 52, 55 (8th Cir. 1988); Dexter v. Kirschner, 972 F.2d 1113, 1117 (9th Cir. 1992) (adopting the reasoning of the two Eighth Circuit cases).

In so holding, those courts rely upon the legislative history of § 1396b (i)(1).[5] They read the legislative

---

[5] The only legislative history cited by these courts is the following:

In its discussion of the amendment to this subsection added in 1987, House Report 100-391 states:

> Organ transplant technical.— Under current law, States just offer certain mandatory services, such as inpatient hospital and physician's services, each of which must be sufficient in amount duration, and scope to reasonably achieve its purpose. States may not arbitrarily deny or reduce the amount, duration, or scope of a mandatory service solely because of an individual's diagnosis, type of illness or condition. To assure that coverage decisions for organ transplants are based on clear principles consistently applied, and not on political or media considerations, section 9507 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), P.L. 99-272, [the section herein at issue, 42 U.S.C. § 1396b(i)(1)] requires that a State which covers organ transplant procedures set forth under its Medicaid plan written standards respecting the coverage of such procedures. Under these standards, similarly situated individuals must be treated alike.
>
> The Committee wishes to clarify that the organ transplant procedures which a state covers, and the hospital, physician, and other services these procedures entail, must be sufficient in amount duration, and scope to reasonably achieve their purpose. For example, if a State covers liver transplants for patients with one medical condition but not for patients with another, and if liver transplant is medically indicated and not experimental with respect to each condition, the State's plan would be out of compliance with the amount, duration, and scope requirement. The Committee amendment would clarify that current law requirements for written standards respecting organ transplant procedures must not be construed by HCFA or the States to permit States to provide services that are not reasonable in amount, duration, and scope to achieve their purpose.

H.R. Rep. No. 100-391, 100th Cong., 1st Sess. (1987). (emphasis added). The House Conference Report on the same amendment states:

history indicate Congress's intent that the states be given discretion to choose not to fund organ transplants.

The Fourth Circuit has rejected this interpretation of § 1396b(i)(1). Pereira, 1993 WL 220590. The plaintiff in Pereira, a three-year old child, brought an action contending that the refusal of the state of Virginia to provide payment, through Virginia's Medicaid plan, for a medically necessary heart transplant violated her rights under 42 U.S.C. §§ 1396d(a)(4)(B) and 1396d(r)(5). The Director of the Virginia Department of Medical Services ("Virginia Department") supported its denial of coverage with its interpretation of § 1396b(i)(1) as an affirmative grant of state discretion regarding whether to provide coverage for organ transplants. Id. at *1. Disagreeing with the Virginia Department, the Fourth Circuit held that § 1396b(i)(1), by its plain terms,

---

> (e) Organ Transplant Technical.—States which choose to cover organ transplant procedures may restrict the facilities or practitioners from whom Medicaid beneficiaries may obtain the services, so long as the restrictions are consistent with accessibility of high quality care, and so long as similarly situated individuals are treated alike. . . .

H.R. Conf. Rep. No. 100-495, 100th Cong., 1st Sess. (1987) (emphasis added).

simply provides that federal payments will not be made for organ transplants unless the state has promulgated specified written procedures. Id. at *2. The court added that this subsection does not affirmatively confer upon the states the discretion to elect not to fund transplants. Id. Finding the statutory language to be clear and finding no inconsistent legislative history, the Fourth Circuit rejected the Eight and Ninth Circuits' analysis. Id. at *3 through *5. The Fourth Circuit also noted that Congress inserted this subsection concerning written standards for organ transplants in section (i), which lists exclusions from federal funding.[6] Id. at *2. From that textual observation, the Pereira court concluded that subsection (i)(1) should be read, like subsections (i)(2) through (14), merely as an explanation of an instance in which federal payments will not be made. Id. at *3.

Based on the broad language of § 1396d(r) (the EPSDT provision), the Pereira court interpreted that subsection to require Medicaid participating states to pay

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[6] Subsection (i) begins with the heading "Payments for organ transplants; item of service furnished by excluded individual, entity, or physician; other restrictions." The subsection explains, for example, that federal payment will not be made for services performed by a physician who fails to meet the statutory qualifications. 42 U.S.C.A. § 1396b(i)(14) (West 1992 & Supp. 1993).

for all medically necessary transplants for qualified recipients under age twenty-one. Pereira, 1993 WL 220590, at *3. The court, therefore, affirmed the district court's requirement that the Virginia Department fund the plaintiff's transplant.

The Eighth and Ninth Circuits did not address the EPSDT provisions in the cases in which they construed § 1396b(i)(1) to allow states to choose not to cover organ transplants. The Eighth Circuit decided Ellis before the 1989 amendment adding § 1396d(r)(5) to the statute. The issue of coverage under the EPSDT provisions was not before Eighth Circuit in Meusberger because the plaintiff was thirty-one years old. The Ninth Circuit did not address the issue in Dexter; we presume EPSDT coverage was not involved because of the age of the recipient.

Two district courts have considered the meaning of the EPSDT provisions. Miller v. Whitburn, 816 F.Supp. 505 (W.D. Wisc. 1993); McLaughlin v. Williams, 801 F.Supp. 633 (S.D. Fla. 1992). In McLaughlin, Judge Marcus of the Southern District of Florida read § 1396d(r)(5) to "make 'necessary' medical treatment a substantive provision considering the extent

of coverage for infants. . . ." McLaughlin, 801 F. Supp. at 637 n.3. The facts and legal issues in Miller are very similar to those presented by the parties in the case at bar. Chief Judge Crabb of the Western District of Wisconsin determined that Congress gave states the option to elect not to cover organ transplants. Miller, 816 F.Supp. at 509. In so doing, like the Eighth and Ninth Circuits, she relied on the legislative history of § 1396b(i)(1). Id. Reading the facially broad language of the EPSDT provisions to contradict her understanding of § 1396b(i)(1), she looked for legislative history or administrative regulations that might clarify the scope of the EPSDT provisions. Id. at 510. Judge Crabb found neither to indicate that Congress intended to make a "sweeping" change; therefore, she concluded that the EPSDT provisions do not "make transplant procedures mandatory for eligible Medicaid recipients under 21 by superseding the state's statutory authority to decide whether they would cover the cost of organ transplants." Id. at 511.

We find the Fourth Circuit decision in Pereira to be the better reasoned one. We, like the Fourth Circuit, doubt that § 1396b(i)(1) gives the states discretion to

elect not to cover organ transplants. It seems more likely that the subsection is a statement imposing conditions for federal funding of organ transplants, rather than an affirmative grant of discretion. We find persuasive the Fourth Circuit's analysis of the legislative history and its conclusion that that history is inconclusive. Furthermore, we find no conflict between §§ 1396b(i)(1) and 1396d(r)(5) that requires resort to legislative history. The Supreme Court explained in Burlington Northern Railroad v. Oklahoma Tax Com'n, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860 (1987), that the language of the statute is controlling in the absence of exceptional circumstances or a clearly expressed legislative intention to the contrary.

We are not compelled, in this case, to decide the question of what, if any, discretion § 1396b(i)(1) grants to the states because of the clear mandate of §§ 1396d(a)(4)(B) and (r)(5). The language of § 1396d(r)(5) expressly requires Medicaid participating states to provide necessary treatment "to correct or ameliorate defects and physician . . . illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan."

42 U.S.C.A. § 1396d(r)(5) (West 1992 & Supp. 1993)(emphasis added). Thus, even if § 1396b(i)(1) were construed to give Florida discretion not to provide funding of organ transplants, the 1989 amendment adding § 1396d(r)(5) took it away for individuals under the age of twenty-one who are otherwise qualified under the state plan. Florida may not elect, therefore, not to pay for a liver-bowel transplant and incidental medical treatment for Lexen Pittman, a qualified Medicaid recipient under age twenty-one.

Having rejected the Secretary's argument on its merits, we easily conclude that Lexen satisfies the other prerequisites for injunctive relief.

CONCLUSION

Through our order of July 29, 1993, we **VACATED** the order of the district court denying Lexen injunctive relief and **REMANDED** the action to the district court for the issuance of an appropriate preliminary injunction consistent with our earlier order. See Appendix.

APPENDIX

ORDER:

Ramona Pope filed this action in the district court as next friend of her infant son, Lexen Pittman. She seeks declaratory and injunctive relief requiring the defendant to pay for a liver-bowel transplant and incidental medical services for Lexen. The district court denied the plaintiff's request for a preliminary injunction, and the plaintiff appeals. We expedited consideration, heard oral argument yesterday, and now enter judgment on the merits.

The defendant argues that the plaintiff is not entitled to the requested relief because 42 U.S.C. § 1396b(i)(1) gives Florida discretion to elect not to provide coverage under its Medicaid plan for liver-bowel transplants for infants. We disagree; we conclude that § 1396b(i)(1) does not give Florida such discretion. We also conclude that the Plaintiff has satisfied all of the prerequisites for injunctive relief.

The order of the district court denying plaintiff injunctive relief is **VACATED** and the action is

REMANDED to the district court with instructions to issue an appropriate preliminary injunction.

The district court found it unnecessary to consider the defendant's argument relative to the amount of any financial guarantee to be provided Children's Hospital of Pittsburgh. Upon remand the district court should consider this argument.

Due to the exigencies of the situation, the district court should speedily determine what injunction is appropriate, and immediately issue it.

This order constitutes the judgment of this court on the merits of this appeal. The mandate shall issue immediately. The filing of a petition for rehearing shall not stay the mandate. See Fed. R. App. P. 41(a).

The court defers preparation and filing of a more comprehensive opinion in order to expedite disposition of this appeal. The court will, however, prepare and file an opinion forthwith.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN,

Plaintiff,

by his next friend,
Ramona Pope

CASE NO. 93-6461-CIV-ROETTGER
MAGISTRATE SELTZER

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant.
_____/

ORDER

This cause has come before the Court upon remand from the United States Court of Appeals for the Eleventh Circuit.

On August 2, 1993, arguments were heard concerning the amount of the financial guarantee to be provided to Children's Hospital of Pittsburgh.

It is ordered that the defendant official of the Florida medicaid agency must provide medically necessary comprehensive liver/intestine transplant services for plaintiff including but not limited to pre-

transplant evaluation and other diagnostic services; transportation for plaintiff and his mother; transplants; outpatient and other post-transplant services and drugs. The Secretary of HRS is ORDERED to immediately make a financial authorization of Seventy-five (75%) percent of the cost of services indicated above to the Children's Hospital of Pittsburgh, the University of Pittsburgh, the University of Pittsburgh transplant physicians, and any other necessary health care providers, including air ambulance providers.

No bond is required of plaintiff.

Entered this 2nd day of August, 1993.

/s/NORMAN C. ROETTGER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4783

LEXEN PITTMAN,
by his next friend, Ramona Pope,

Plaintiff-Appellant,

versus

SECRETARY,
FLORIDA DEPARTMENT OF HEALTH
& REHABILITATIVE SERVICES,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

Before ANDERSON, EDMONDSON, and COX,
Circuit Judges.

PER CURIAM:

The Defendant-Appellee has filed an emergency motion seeking a stay of this court's order of July 29, 1993, and the district court's order of August 2, 1993. In support of the motion, the Defendant-Appellee makes several arguments. The difficulty is that the arguments

presently advanced (except for the argument addressed in this court's prior order and opinion) were neither advanced in the Defendant-Appellee's initial brief on appeal nor presented at oral argument on appeal. (See appellee's brief, pp. 4-5). The Defendant-Appellee has waived his right to argue issues not previously raised. See McGinnis v. Ingram Equipment Co., Inc., 918 F.2d 1491, 1496 (11th Cir. 1990) (en banc); FSLIC v. Haralson, 813 F.2d 370, 373 n.3 (11th Cir. 1987).

The emergency motion for stay is **DENIED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN,
PLAINTIFF,

BY HIS NEXT FRIEND,
RAMONA POPE

VS. CASE NUMBER
93-6461-CIV-
SECRETARY, FLORIDA ROETTGER
DEPARTMENT OF
HEALTH AND REHABILITATIVE
SERVICES,
DEFENDANT.

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE NORMAN C. ROETTGER, U.S. DISTRICT JUDGE, IN FORT LAUDERDALE, BROWARD COUNTY, FLORIDA, ON MONDAY, AUGUST 2, 1993, IN THE ABOVE-STYLED ACTION.

APPEARANCES OF COUNSEL:

For the Plaintiff: MARY ANNE ROBERTSON, ESQ.

For the Defendant: KAREL BAARSLAG, ESQ.

CARL SCHANZLEH
OFFICIAL COURT REPORTER
U.S. COURTHOUSE
299 E. BROWARD BLVD., 202B
FORT LAUDERDALE, FLORIDA 33301

(FORT LAUDERDALE, BROWARD COUNTY, FLORIDA; MONDAY, AUGUST 2, 1993, IN OPEN COURT.)

THE COURT: EXCUSE ME, FOLKS, MY BOSS IS JUST CALLING ME OUT THERE.

PLEASE BE SEATED, FOLKS.

CAN WE RESUME, PLEASE.

THE CLERK: CASE NUMBER 93-6461-CIVIL-ROETTGER, LEXEN PITTMAN VERSUS H.R.S.

THE COURT: AND MISS ROBERTSON?

MS. ROBERTSON: I AM MARY ANNE ROBERTSON REPRESENTING THE PLAINTIFF, RAMONA POPE. WE ALSO HAVE PEOPLE FROM THE CHILDREN'S HOSPITAL FROM PITTSBURGH HERE IN THE COURTROOM TODAY.

THE COURT: VERY WELL. THANK YOU, MISS ROBERTSON.

MR. BAARSLAG: CHIEF JUDGE, MY NAME IS KAREL BAARSLAG AND I REPRESENT THE MEDICAID PROGRAM.

THE COURT: MR. BAARSLAG. I WILL GET IT RIGHT YET.

GO AHEAD.

MR. SCOTT: GORDON SCOTT, SIR, CO-COUNSEL WITH MR. BAARSLAG.

THE COURT: THANK YOU.

WE ARE HERE ON A FAIRLY LIMITED MISSION, AND IT IS TO DETERMINE THE EXACT CIRCUMSTANCES TO BE FOLLOWED IN CONNECTION WITH THE SERVICES TO BE RENDERED BY THE PITTSBURGH HOSPITAL, THE AMOUNT, ET CETERA, ET CETERA.

HAVE THE LAWYERS BEEN ABLE TO DISCUSS THIS AND COME UP WITH ANY KIND OF AN AGREEMENT?

MS. ROBERTSON: YES, WE HAVE, YOUR HONOR.

THE COURT: VERY WELL.

MR. BAARSLAG: YES SIR, WE HAVE.

THE COURT: WHY DON'T YOU ANNOUNCE WHAT THE TERMS OF THE AGREEMENT ARE. I DON'T CARE WHICH ONE OF YOU DOES IT.

MS. ROBERTSON: H.R.S. HAS AGREED TO PAY THE 75 PERCENT OF BILLED CHARGES. WAS THAT THE FINAL —

MR. BAARSLAG: THAT IS CORRECT, JUDGE. WITHOUT CREATING ANY PRECEDENT OR CHANGE IN RULE OR POLICY THAT WE MAY HAVE, IT IS A SETTLEMENT OF THE ISSUE ON THIS REMAND, SIR, WITHOUT ANY PREJUDICE TO ANY APPELLATE RIGHTS THAT WE MAY HAVE, SIR.

THE COURT; VERY WELL. AND DO YOU HAVE ANY KIND OF A PROPOSED FORM, MISS ROBERTSON?

MS. ROBERTSON: YES, I DO, YOUR HONOR.

THE COURT: WE WERE TO HAVE THIS HEARING AS IMMEDIATELY AS POSSIBLE, AND I FOUND OUT ABOUT IT THURSDAY AFTERNOON LATE, SO WE SET IT UP FOR TODAY. I COULD NOT GET AHOLD OF THE TEXAS COUNSEL FOR PLAINTIFF.

MS. ROBERTSON: YOUR HONOR, HE WAS SORRY THAT HE WASN'T ABLE TO BE HERE AT THE HEARING TODAY. HE JUST ISN'T REACHABLE BY THE PHONE.

THE COURT: WHY DON'T YOU BE SEATED AND LET ME TAKE A LOOK AT THIS, PLEASE.

IS IT NECESSARY THAT THE CHILD TRAVEL BY AIR AMBULANCE UP TO PITTSBURGH?

MS. ROBERTSON: YOUR HONOR, I AM NOT POSITIVE ABOUT THAT. IN TALKING TO MY CO-COUNSEL HE SAID IT IS POSSIBLE THAT IT WOULD BE NECESSARY. I THINK IT IS UP TO THE MEDICAL PEOPLE TO EVALUATE THAT, HOW DANGEROUS IT WOULD BE FOR HIM TO TRAVEL IN A REGULAR PLANE. I REALLY CAN'T SAY FOR SURE.

THE COURT: OBVIOUSLY THERE IS CONSIDERABLE DIFFERENCE IN EXPENSE I BELIEVE BETWEEN THE TWO.

MS. ROBERTSON, DO YOU INTEND TO PUT ON ANY WITNESSES THAT ARE HERE FROM THE UNIVERSITY OF PITTSBURGH?

MS. ROBERTSON: I HAD INTENDED TO PUT ON THE FINANCIAL COORDINATOR, BUT SINCE WE HAVE JUST ENTERED INTO THE STIPULATION OUTSIDE THE COURTROOM I DON'T THINK IT IS NECESSARY UNLESS YOU WOULD LIKE IT.

THE COURT; VERY WELL. HAVE YOU ALSO ENTERED INTO ANY KIND OF AN AGREEMENT AS TO THE AUTHORIZED AMOUNT?

MS. ROBERTSON: THE AGREEMENT IS 75 PERCENT OF BILLED CHARGES. IT IS NOT FILLED IN HERE. WE JUST TALKED ABOUT THAT.

THE COURT: ALL RIGHT. I WILL BE HAPPY TO PUT THAT IN HERE.

WHILE THEY ARE, AM I GOING TO NEED ANY TESTIMONY AT ALL FROM ANY OF THE PEOPLE FORM THE UNIVERSITY OF PITTSBURGH CHILDREN'S HOSPITAL?

MS. ROBERTSON: YOUR HONOR, IT IS POSSIBLE.

I BELIEVE H.R.S. HAS ANOTHER MOTION, BUT I DON'T KNOW WHAT'S GOING TO HAPPEN ON IT. IF WE NEEDED IT, IT IS POSSIBLE WE WOULD NEED THEM. I DON'T KNOW HOW YOU ARE GOING TO RULE ON IT.

MR. BAARSLAG: JUDGE, WE ALSO HAVE—

THE COURT: COUNSEL, PLEASE.

MR. BAARSLAG: —A PROPOSED RECOMMENDED ORDER. IT DIFFERS PRINCIPALLY FROM THE PLAINTIFF'S IN THAT WE ARE ALSO REQUESTING THE COURT TO RULE ON OUR PENDING MOTION TO DISMISS THE 1983 CAUSE OF ACTION.

WE HAD INCORPORATED A FAVORABLE FINDING IN OUR PROPOSED ORDER. WE DID SO TO AVOID PIECEMEAL APPELLATE REVIEW. I DON'T KNOW THAT THAT WOULD NECESSARILY, BEING A PURELY LEGAL ISSUE, REQUIRE ANY FACTUAL TESTIMONY, BUT IN ANY CASE THAT WAS OUR OTHER PENDING MOTION.

THE COURT: IN MY PRIOR ORDER I CERTAINLY USED ALL THE LANGUAGE OF 1983 WITHOUT, I GUESS, EXPRESSLY DENYING YOUR MOTION, OR GRANTING YOUR MOTION TO DISMISS, BUT THAT IS INHERENT WITHIN THE ORDER.

MR. BAARSLAG: YES, SIR, AND IF WE MAY—

THE COURT: TO BE CONSISTENT IT WOULD HAVE BEEN GRANTED AT THAT TIME I ENTERED MY ORDER AND THEN SET ASIDE BY THE COURT OF APPEALS. THEY HAVE NOT TOLD US WHY, BUT THAT WILL BE FORTHCOMING.

MR. BAARSLAG: YES SIR. JUST IF I MAY, JUST ONE LAST TECHNICALITY.

SO THAT WE CAN AVOID FURTHER PROCEEDINGS AT THIS POINT MAY WE RESPECTFULLY RESPECT ORE TENUS A MOTION TO STAY THE ORDER WHICH YOU HAVE JUST ENTERED?

THE COURT: THE ORDER AUTHORIZING THE UNDERWRITING OF THE LIVER-BOWEL TRANSPLANT?

MR. BAARSLAG: YES SIR. I UNDERSTAND THAT THE COURT HAS TO DO SO BY VIRTUE OF THE MANDATE OF THE ELEVENTH CIRCUIT, BUT WE WOULD LIKE —

THE COURT: I WILL DENY ANY STAY ON THAT. I THINK THAT IS WITHIN THE RULING OF THE COURT OF APPEALS.

MR. BAARSLAG: YES, SIR. THANK YOU. WE APPRECIATE THAT.

THE COURT: ANY OTHER LOOSE ENDS WE NEED TO TAKE CARE OF, FOLKS?

MS. ROBERTSON: I DON'T THINK SO, YOUR HONOR.

THE COURT: IN TALKING WITH THE VARIOUS JUDGES AROUND THE COUNTRY, IT SEEMS TO ME THAT THE MATCHING PROCESS AND THE OPERATION SEEM TO OCCUR REASONABLY QUICKLY. I DON'T KNOW. OBVIOUSLY THERE IS NO WAY — I ASSUME THE ESTIMATE AS TO THE TIME FOR A MATCH OR A DONOR, HOW LONG IT WILL TAKE.

MS. ROBERTSON: I BELIEVE IT CAN TAKE SEVERAL MONTHS SOMETIMES.

THE COURT: DEPENDING ON —

MS. ROBERTSON: DEPENDING ON WHO IS AVAILABLE.

THE COURT: — WHO IS AVAILABLE, BLOOD TYPE, ET CETERA, ET CETERA?

ANYTHING ELSE WE NEED TO TAKE UP AT ALL?

MS. ROBERTSON; NO, SIR.

THE COURT: VERY WELL. THANK YOU VERY MUCH. I HOPE IT IS A SUCCESS.

MS. ROBERTSON: THANK YOU.

CERTIFICATE

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF FLORIDA

I, CARL SCHANZLEH, OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DO HEREBY CERTIFY THAT THE FOREGOING 7 PAGES CONSTITUTE A TRUE TRANSCRIPT OF THE PROCEEDINGS HAD BEFORE THE SAID COURT HELD IN THE CITY OF FORT LAUDERDALE, FLORIDA, IN THE MATTER THEREIN STATED.

IN TESTIMONY WHEREOF, I HEREBY SET MY HAND ON THIS THE 8TH DAY OF AUGUST, 1993.

CARL SCHANZLEH
OFFICIAL COURT REPORTER
SOUTHERN DISTRICT OF FLORIDA

No. 93-633

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs.

LEXEN PITTMAN, by his next friend, Ramona Pope,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent LEXEN PITTMAN, through undersigned counsel, opposes the Florida AGENCY FOR HEALTH CARE ADMINISTRATION's Petition for Writ of Certiorari review of the July 29 and August 3, 1993 Orders of the United States Court of Appeals for the Eleventh Circuit granting preliminary injunctive relief. Those Orders compel the State of Florida to provide funding for a liver/bowel transplant pursuant to 42 U.S.C. § 1396d(r)(5) for Respondent, a Medicaid-eligible 15-month old child. It is undisputed that Lexen Pittman cannot long survive without a liver-bowel transplant. (Respondent's Appendix A and B) [hereinafter Resp. App. ___]).

The District Court in response to the Eleventh Circuit Order of July 29, 1993, convened a hearing on August 2, 1993. Immediately preceding the hearing, Petitioner agreed to pay seventy-five percent of the cost of charges for transplant services which agreement was incorporated in the Preliminary Injunction Order of August 2, 1993.(Petitioner's appendix 81-82[hereinafter Pet. App. _____]). Subsequently, Lexen was immediately placed on the list at Children's Hospital of Pittsburgh to receive a liver/bowel transplant and he currently has been re-admitted to the local hospital intermittently due to bouts of infection as he awaits a donor.

Despite its agreement to pay 75% of billed charges, Florida Medicaid moved for a stay of the District Court Order of August 2, 1993, which motion was immediately denied by the Eleventh Circuit on August 12, 1993. (Pet. App. 182-183). On September 10, 1993,

the District Court ordered that the Preliminary Injunction be made permanent. An appeal of that order by Petitioner is presently pending before the Eleventh Circuit Court of Appeals. (Resp. App. C). On August 18, 1993 the Agency applied for a Stay Pending Certiorari review of the July 29 and August 3, 1993 Orders of the Eleventh Circuit. Justice Anthony M. Kennedy denied the application on August 20, 1993. (Resp. App D).

For the reasons that follow, the Petition fails to establish the prerequisites for the granting of certiorari review, and should be denied.

REASONS FOR DENYING THE WRIT

A. No Conflict Exists Among the Circuit Courts.

A principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning and provisions of federal law. Braxton v. United States, 111 S. Ct. 1854 (1991); U.S. Sup. Ct. Rule 10.1, 28 U.S.C.A.

Petitioner misleads the Court in stating that the writ should be issued to eliminate the "conflict between the Circuit and federal courts. "(Pet. Br. 8). No conflict exists among the circuit courts of appeal on the dispositive issue in this case of whether 42 U.S.C. § 1396d(r)(5) (mandating medically necessary procedures for Medicaid-eligible children under 21) is consistent with, or supersedes, § 1396b(i)(1) (governing transplant funding).

The only two circuits which have addressed the interplay between these two sections are in agreement. The Eleventh Circuit

in the case below, Pittman v. Secretary, Dept. of HRS, 998 F. 2d 887, 891 (11th Cir. 1993), expressly adopted the Fourth Circuit's reasoning from Pereira v. Kozlowski, 996 F. 2d 723 (4th Cir. 1993), which held that a state must pay for medically necessary transplants to children under twenty-one who are otherwise qualified under the early and periodic screening, diagnostic, and treatment services [EPSDT] provisions of the Medicaid Act.

In Pereira, Circuit Judge Luttig reached that conclusion after thoroughly examining the legislative history of 42§ 1396 b(i)(1), even though he deemed the resort to legislative history as undertaken by the court in Ellis v. Patterson, 859 F. 2d 52 (8th Cir. 1988), to be not only unwarranted but improper, considering the plain language of the statute. The Court concluded:

> We are not unaware of the potential consequences of our decision today. Our responsibility, and the limit of our authority, however, is to interpret the law as it has been enacted by Congress.
> ... It may even be... that Congress intended by the latter provision [§1396 b (i) (1)] to afford the states absolute discretion whether to fund organ transplants. If it did so intend, however,...it did not embody that intention in statute.
>
> Pereira at 727.

The Eleventh Circuit in Pittman, recognizing the exigency of Lexen's situation, expediently issued a written decision in his favor on the day following oral argument. In contrast, the Florida medicaid agency had delayed a written decision on his request for payment for a liver-bowel transplant for several months, finally denying him on the basis that the procedure was considered

experimental, and therefore, not covered under the medicaid program. (Resp. App. E). At the initial status conference on the Motion for Preliminary Injunction, however, the agency changed its position and waived the experimental issue as the Court pointed out in Pittman at 888.

Such an approach appeared strategically reasonable in light of McLaughlin v. Williams, 801 F. Supp. 633 (S.D. Fla. 1992), a case directly on point, in which Florida Medicaid had raised the issue and lost. Judge Marcus in McLaughlin examined in depth the criteria that must be considered in determining whether a procedure is experimental. Expert testimony established that in a two year period, seventeen patients at Pittsburgh received transplants of either the liver and small bowel or small bowel. Omitting two, fourteen out of fifteen survived, a ninety-three percent success rate. This evidence, in conjunction with other factors, led the Court to conclude that a liver-bowel transplant was non-experimental. McLaughlin did not consider the issue of whether the EPSDT amendments repealed by implication 42 U.S.C. 1396b(i)(1) as Petitioner implies. (Pet.Br. 10-11). Rather, the court in McLaughlin, after disposing of the experimental issue, soundly decided the issue on the narrowest grounds by mandating coverage solely under the EPSDT provisions.

The Eleventh Circuit in Pittman relied on McLaughlin in considering the issue of medical necessity as applied to a liver-bowel transplant and its analysis of EPSDT. The Court basically mirrored the reasoning of Perreira concerning the relationship of

§ 1396 b(i) (1) to § 1396 d(r) (5), concluding like Perreira, that § 1396 d(r)(5) expressly requires medicaid coverage for a liver-bowel transplant. Pittman at 891-892.

While the Eighth and Ninth Circuits have found that states have discretion to deny coverage for transplants for adults under § 1396b(i)(1), those circuits have not considered the impact of the later-enacted § 1396d(r)(5) on transplants to minors. Miller v. Whitburn, 816 F. Supp. 505 (W.D. Wisc. 1993), appeal docketed No. 93-1976 (7th Cir. argued June 10, 1993), does involve a liver-bowel transplant for a minor child, and is awaiting decision before the Seventh Circuit.[1]

Respondent even misrepresents the significance of two federal district court transplant cases in which undersigned counsel Kimble represented the respective plaintiffs: Lisa Cooley v. Robert Williams, CCH Par. 40916 (N.D. Fla 1991) and Alderman v Williams, No 92-1388-Civ-T-99C (M.D. Fla. 1992)(Pet.Br.10). The Cooley case which did involve a minor was not appealed because Lisa Cooley died the night of the Preliminary Injunction hearing. Moreover, the EPSDT section which mandates coverage for children was not addressed in her case. Alderman elected not to appeal because his transplant was subsequently covered under medicare. The EPSDT provision was inapplicable to him because he was an adult. In any

---

[1] Since the Pereira and Pittman Circuit Court decisions issued subsquent to the District Court decision pending appeal in the Seventh Circuit, there is no reason to believe that the decision there will differ from the Fourth and Eleventh Circuits.

event, Cooley and Alderman, both unpublished decisions, have each been rendered invalid by the Eleventh Circuit decision in Pittman.

Nor is there an important, substantial, federal question ripe for review. See discussion of whether 42 U.S.C. § 1396 d (r)(5) creates a private cause of action under § 1983, infra at subsection (b). Even if one existed, the Agency's petition is premature because its Appeal of the District Court Order issuing a Permanent Injunction is currently pending before the Eleventh Circuit.

b. An enforceable § 1983 action exists pursuant to 42 U.S.C. § 1396 d (a)(4)(B) and § 1396d (r)(5) of the Medicaid Act.

The Agency frames the § 1983 issue as "Whether there is a Private Right Enforceable by 42 U.S.C. 1983 to compel a state medicaid program to fund a liver-bowel organ transplant operation it has chosen not to cover." (Pet. Br. i). The only other specific indication in the petition of the particular provision of the Medicaid Act which the Agency claims is unenforceable under § 1983 is a reference to the defenses raised below: "that 42 U.S.C. 1396b (i)(1) did not create a private right of action." (Pet. Br. 2). However, Lexen claims a § 1983 right of action under the EPSDT provisions of the Medicaid Act: 42 U.S.C. § 1396 d(a)(4)(B) and § 1396 d(r)(5). (Pet. App. 169). Futhermore, the Agency's reliance on Suter v. Artist, 112 S. Ct 1360 (1992) and Pennhurst State School and Hospital v. Halderman, 101 S. Ct. 1531 (1981), which were not medicaid cases is unapplicable to whether particular provisions of the Medicaid Act give rise to § 1983 violations.

In addition to the cases cited supra in which the courts have upheld § 1983 actions as applied to minors seeking organ transplants, Florida Medicaid's argument would eradicate an established line of cases upholding a § 1983 cause of action under the Medicaid Act. In Wilder v. Virginia Hospital Association, 110 S. Ct. 2510 (1990) this Court held that Congress did not forclose a private judicial remedy for enforcement of the Medicaid Act under 42 U.S.C. § 1983. Id at 2519. Indeed, the cases cited in the petition were brought under § 1983 without objection by the defendants or the courts. See e.g. Miller v. Whitburn, 816 F. Supp 505, 506 (W.D. Wis. 1993) ("[Plaintiff's § 1983] claim is substantial enough to avoid dismissal for lack of jurisdiction whether or not it succeeds on the merits."); Ellis v. Patterson, 713 F. Supp 292, 294 (E.D. Ark 1988), vacated and remanded, 859 F.2d 52 (8th Cir. 1988). See also Wood v. Wallace, 825 F. Supp. 177 (S.D. Ohio 1993) (analyzing Wilder, distinguishing it from Suter, and finding a private cause of action in a different section of the Medicaid Act; certifying the question for an interlocutory appeal).

Additionally, Visser v. Taylor, 756 F. Supp. 501, 507 (D. Kan. 1990), which required medicaid coverage for Clozapine, discussed at least fourteen cases which upheld § 1983 claims under the Medicaid Act. Some examples of these medicaid cases are Mitchell v. Johnston, 701 F. 2d 337 (5th Cir. 1983) (dental services under EPSDT); Allen v. Mansour, 681 F. Supp. 1232 (E.D. Mich, 1986)

(liver transplant); and Ledet v. Fisher, 638 F. Supp 1288 (M.D. La. 1986) (eyeglasses).

Even assuming arguendo that Suter can be analogously considered, it is distinguishable from the instant case as it was from Wilder. The provisions of 42§ 1396 d(a)(4)(B) and § 1396 d (r)(5) clearly mandate EPSDT services for eligible individuals under 21 and define them to include "... such other necessary health care ... to correct physical illnesses discovered by the screening services." Accordingly, such language should be interpreted as mandatory pursuant to Wilder and Wood, not precatory as in Suter.

C. Non-experimental Organ Transplants Constitute Necessary Medical Care

The agency exaggerates the effect of the Federal Court decisions mandating payment for organ transplants in stating: "[t]he situation now, very simply, is that Florida cannot refuse to fund any organ transplant operation for persons under 21 and, arguably for anyone, no matter what the cost, no matter how little efficacy there may be, at the expense of other Medicaid recipients." (Pet. Br. 8).

Petitioner wrongly characterizes the thrust of the Court decisions which have placed limits on the nature and cost of the type of transplants for which Medicaid must pay. Medicaid must fund organ transplants only when they are non-experimental, and therefore, efficacious. (McLaughlin at 638 citing to the standards concerning medical necessity as discussed in Rush v. Parham, 625 F.

2d at 1156 n. 11.) Such procedures become less expensive as the patient's recovery time decreases and they become more common. (See complaint, para.10, Pet. App. 4).

CONCLUSION

The agency's unfounded speculation concerning the financial consequences of this case has clouded its legal perspective, motivating it to file a petition for Writ of Certiorari despite it's agreement to pay 75% of billed charges; its pending appeal in the Eleventh Circuit of the Order granting a Permanent Injunction; and the concurrence of two circuit courts which have rejected the arguments it presents to this Court.

The Fourth and Eleventh Circuits have interpreted the law as it exists to mandate payment for a medical procedure which provides the only hope of survival for Lexen. These Court decisions which soundly construe the law, giving priority to the value of a human life over financial considerations, should remain undisturbed.

For all the forgoing reasons, Respondent Lexen Pittman respectfully requests that the Petition for Writ of Certiorari be denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN

Plaintiff

CASE NO. 93-6461-CIV-ROETTGER
MAGISTRATE SELTZER

by his next friend,
Ramona Pope

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant.
_____/

AFFIDAVIT OF DR. MARIO TAÑO

BEFORE ME, a notary public, in and for the state of Florida, duly authorized to administer and take acknowledgements, personally appeared DR. MARIO TAÑO, who, being by me first duly cautioned and sworn, under oath, deposes and says:

I am licensed as a physician by the State of Florida. My specialty is pediatric gastroenterology and I am a diplomate of the American Board of Pediatrics.

Lexen Pittman is an unfortunate 13-month-old infant who suffers from short-bowel syndrome; a large portion of his small intestine was resected in radical surgery when he was approximately 7 days old. As a result his body is unable to absorb nutrients; functionally, he receives all his nutritional needs from total parenteral nutrition (TPN), which is a form of intravenous feeding. This form of feeding has resulted in impairment of liver function and this child is now in liver failure.

PLAINTIFF'S EXHIBIT 9

Lexen has required inpatient hospitalization on a frequent basis. He has probably spent more of his life in Broward General, than he has at home. As of this date he is hospitilized at Broward General, having been readmitted for central line sepsis and gastrointestinal bleeding on April 21, 1993. I have attached and include as part of this affidavit my consultation Report of May 31, 1993, addressed to Dr. Robert F. Hunt, D.O., who is his attending physician.

The prognosis for this child with the current available mode of therapy is poor. It is inevitable that this child's liver failure will progress. The only possibility this child has to survive is with a small bowel and liver transplant. It is very difficult to say with precision what Lexen's life expectancy would be, if he does not receive a transplant. However, based on his current physical condition and on the basis of reasonable medical probability, I would estimate that without a transplant, this infant will die within the next year. Also, and maybe more importantly, Lexen is subject to gastrointestinal bleeding, central line infections, and other dangers which are attendant to his TPN feeding and his liver failure; until he receives a transplant, any of the dangers mentioned could throw him into a serious spell of illness from which he might die or survive in such poor condition that a transplant would not be feasible. Time is now critical.

Any further delay will threaten the baby's life or will diminish his chances of making an optimum recovery from the transplant.

Mario E. Tano, M.D.

The foregoing instrument was acknowledged before me this 17TH day of June, 1993, by MARIO E. TANO M.D., who is personally know to me or who has produced FLDL# T500-546-57-3330 as identification and who did take an oath.

Notary Public, State of Florida
Comm# AA 728291

My commission expires:

Notary Public, State of Florida
My Commission Expires Nov. 29, 1993
Bonded Thru Troy Fain Insurance Inc.

PITTMAN, LEXEN **MARIO TAÑO, M.D.**
MR# 630005

Date of Consultation: 05/31/93
Attending Physician: ROBERT F. HUNT, D.O.

HISTORY OF PRESENT ILLNESS: Lexen is a well-known infant to me. The child has liver failure and short-bowel syndrome and was a premature infant here at the Neonatal ICU at Broward General. Also, the child is in liver failure and recently was rejected by the State for liver and small bowel transplant. The mother, however, is pursuing this and has notified Pittsburgh for help.

The child is readmitted for line sepsis and gastrointestinal bleeding. Chronically, the child has elevated liver enzymes, elevated PT and PTT, as well as elevated bilirubin. Also chronically the child does have short-bowel syndrome and is on total parenteral nutrition. He has TPN cholestasis, which is a known complication. The child has a central line and has had recurrent episodes of infections. His last bilirubin was 24.2, which decreased to 23, his SGOT 263, now 279. His SGPT initially was 380, now 97. PT was 14.5, PTT 29.1. His triglycerides were elevated at 442, down to 279, and this was decreased on hyperalimentation. Initially he had gastrointestinal bleeding and this has resolved. He is on only clear fluids p.o., he does not take any formula orally.

PHYSICAL EXAMINATION:

VITAL SIGNS: Stable. He is on room air. Weight is not available at this time.

GENERAL: He is an alert baby, significantly jaundiced.

HEENT: Sclera is quite icteric, his facies also edematous.

NECK: Supple, with free range of motion.

CHEST: Symmetrical. There is a central line placed.

HEART: Regular rate and rhythm. No gallops, no murmurs.

LUNGS: Clear.

ABDOMEN: Protuberant. There are several surgical scars. His liver is quite enlarged, although it is quite difficult to ascertain the exact

PLAINTIFF'S EXHIBIT

PITTMAN, LEXEN **MARIO TANO, M.D.**
MR# 630005

size. Spleen is also enlarged. The abdomen also is free of masses. The bowel sounds are decreased.

EXTREMITIES: Symmetrical.

NEUROLOGICAL: The child has no gross motor or sensory deficits.

IMPRESSION: Unfortunate infant with cholestasis, liver failure, hyperbilirubinemia, elevated liver enzymes and elevated triglycerides, all of which are functions of the liver. He must also have fatty metamorphosis and fatty infiltrations which are related to TPN and cholestasis as well as liver failure.

I have explained to the mother that he certainly is at risk for all the complications from liver failure including but not limited to gastrointestinal bleeding, and certainly the only chance of survival for this child is a liver and small-bowel transplant. However, we will continue to support the child with hyperalimentation, fresh frozen plasma as needed, as well as vitamins A, D, E and K, which are the fat-soluble vitamins. The mother is well aware of the child's status. Also, the child will be treated for his CVL sepsis during this hospitalization. I will follow this child for his GI problems, although Dr. Hunt is the primary care physician and coordinates most of his medical problems.

Other suggestions are that the child have lipids reduced on the hyperalimentation to one to two times per day, since his dietary needs will be that at least 20% of his calories are from lipids. To a certain degree, his inability to digest fats is from the lack of liver function, however his dietary needs are still present. I do not feel that the child can be completely off of dietary intake of lipids. I will address this with Dr. Hunt.

MARIO TANO, M.D.

MT:ky 7402
d: 06/01/93
t: 06/01/93 2:22 P

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN

Plaintiff

CASE NO. 93-6461-CIV-ROETTGER
MAGISTRATE SELTZER

by his next friend,
Ramona Pope

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant.
_____/

AFFIDAVIT OF DR. DAVID DRUCKER

BEFORE ME, a notary public, in and for the state of Florida, duly authorized to administer and take acknowledgements, personally appeared DR. DAVID DRUCKER, who, being by me first duly cautioned and sworn, under oath, deposes and says:

I am licensed as a physician by the State of Florida. My specialty is pediatric surgeon and I am a diplomate of the American Board of Pediatrics.

I was called upon to provide care for Lexen Pittman on one occasion in November, 1992, so I am familiar with this infant and his need for a liver/small intestine transplant. I am one of the doctors who recommended that Lexen's mother contact the transplant program at the University of Pittsburgh.

I was one of the treating doctors for Lisa Cooley, a baby not much older than Lexen. Lisa also suffered from short bowel syndrome, was in liver failure, and needed a liver/small bowel transplant. A case was filed on her behalf in federal court in

PLAINTIFF'S EXHIBIT 10

Tallahassee during the last week of November, 1991, and a hearing in which medicaid coverage was sought was held on an emergency basis. On the day of the hearing, however, her condition had rapidly deteriorated, and she could not have survived long enough to receive the donor organs.

This is all to say that for infants who are identified as needing a liver/bowel transplant, time is very critical. Even if they appear to be in somewhat stable condition, babies in this condition do often deteriorate rapidly. Until he gets his transplant, Lexen Pittman is subject to many health risks including central line sepsis, gastrointestinal bleeding, common infections and viruses. Any episode caused by the above risks could cause Lexen to deteriorate quickly and die. Moreover, even if he did not die, he might survive in such a worsened condition that a transplant would not be feasible.

David Drucker, M.D.

The foregoing instrument was acknowledged before me this 17th day of JUNE, 1993, by David Drucker M.D., who is personally know to me or who has produced N/A as identification and who did take an oath.

Notary Public, State of Florida
Comm # AA728291

My commission expires:

Notary Public, State of Florida
My Commission Expires Nov. 29, 1993
Bonded Thru Troy Fain - Insurance Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

THE AGENCY FOR HEALTH
CARE ADMINISTRATION,
as successor in interest to,
SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant,

vs. Case No.: 93-6461-CIV-ROETTGER

LEXEN PITTMAN,
by his next friend,
Ramona Pope,

Plaintiff.
_____/

NOTICE OF APPEAL

Notice is hereby given that THE AGENCY FOR HEALTH CARE ADMINISTRATION, as successor in interest to, SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, defendant above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order Granting Permanent Injunction entered in this action on the 10th day of September, 1993.

Respectfully submitted,

KAREL BAARSLAG, ESQUIRE
Senior Attorney
Florida Bar #217158
Agency for Health Care
Administration
1317 Winewood Blvd.
Building 6, Room 271
Tallahassee, FL 32399-0700
(904)922-0337

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 27th day of October, 1993, to: Mary Anne Robertson, Esquire, Legal Aid Services of Broward County, 609 Southwest First Avenue, Fort Lauderdale, Florida 33301-1885 and William Kimble, Esquire, 554 South Summit, No. 502, Fort Worth, Texas 76104.

KAREL BAARSLAG, ESQUIRE

J:\CASE\PAT.40A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

August 20, 1993

Ms. Mary Anne Robertson
Legal Aid Service, Broward Cty
609 S.W. First Avenue
Fort Lauderdale, FL 33301-1885

Re: Agency for Health Care
Administration,
v. Lexen Pittman by his next friend,
Ramona Pope
Application No. A-167

Dear Ms. Robertson:

The application for stay of orders issued by CA11 pending the filing of a petition for certiorari in the above-entitled case has been presented to Justice Kennedy who on August 20, 1993, endorsed thereon the following:

"Deny
AMK
8/20/93"

Very truly yours,

WILLIAM K. SUTER, Clerk

By Cynthia Rapp

Cynthia Rapp
Assistant Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. Gordon Scott
1317 Winewood Blvd
Building 6 Room 271
Tallahassee, FL 32399-0700

Ms. Mary Anne Robertson
Legal Aid Service, Broward Cty
609 S.W. First Avenue
Fort Lauderdale, FL 33301-1885

Mr. William Kimble
554 S. Summit
No. 502
Fort Worth, TX 76104

STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

April 12, 1993

Mario E. Tano, M.D., F.A.A.P.
Children's Center for Gastroenterology
and Nutrition, P.A.
3850 Hollywood Blvd., Suite 202
Hollywood, Florida 33021

Dear Dr. Tano:

This letter is in response to your prior authorization request for a liver bowel transplant for Lexen Pittman Pope. Final medical records, transplant statistics and financial information were received on March 26. This information was then reviewed by medical consultants for Medicaid, and in accordance with the recently adopted recommendations of the HRS transplant advisory committee.

After deliberation of all relevant factors, the Medicaid program is denying your request for approval of transplant evaluation and for the liver bowel transplant. At this point in time, liver bowel transplantation is not offered or considered a covered service. In addition, this procedure is considered experimental by this state. We see nothing in these particular records or this case that warrants an exception to this policy. As you know, liver bowel transplantation is enormously expensive ($300,000-$2 million), and there is no evidence of long term survival (two to five years) for most recipients.

You have a right to appeal this decision within 30 days by filing an appeal in accordance with the provisions of Section 120.57, F.S.

Sincerely,

Gary J. Clarke
Assistant Secretary
for Medicaid

GJC/AR/mf

cc: Sarah Martin, Pittsburgh Transplantation Institute
Ramona L. Pope
Children's Medical Services (J. Michael Cupoli, M.D.)
Medicaid District Program Administrator

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-633

THE AGENCY FOR HEALTH CARE ADMINISTRATION

Petitioner,

vs.

LEXEN PITTMAN by his next friend,
Ramona Pope

Respondent.

PROOF OF SERVICE

I, Mary Anne Robertson, do swear or declare that on this date, November 17, 1993, pursuant to Supreme Court Rules 29,3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Gordon Scott, Esq.
Agency for Health Care Administration
1317 Winewood Blvd.
Tallahassee, Fl 32399-0700

Mary Anne Robertson
Affiant

Subscribed and Sworn to Before Me
this 17th day of November, 1993.

Notary Public in and for
County and State

AVIS DUHANEY
MY COMMISSION # CC258894 EXPIRES
April 3, 1997
BONDED THRU TROY FAIN INSURANCE, INC.